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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~970~~. 885 91

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES ARTERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED AUGUST 30, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 679.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES ARTERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Citation	*c*	1
Proof of service of citation	*d*	2
Transcript from State court	1	2
Petition	1	2
Original notice	6	4
Sheriff's return	7	5
Petition for removal	8	5
Bond for removal	10	6
Order for removal	12	7
Fee bill	13	7
Clerk's certificate	13	8
Amended petition	14	8
Answer	17	9
Trial commenced	18	10
Verdict	19	10
Order denying motion for new trial	20	10
Judgment	20	10
Bill of exceptions	21	11
Evidence for plaintiff	22	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 22, 1889.

	Original.	Print.
Testimony of James Artery	22	11
Joseph G. Moore	36	16
Jerry Artery	39	18
Dr. Waples	61	26
John O'Neill	63	27
Dr. Green	75	32
Lawrence Rice	76	32
James Rellehan	76	33
Evidence for defendant	76	33
Testimony of John Kennedy	77	33
Anthony Donalan	81	35
Patrick Rellehan	83	35
Jerry Artery (recalled)	91	38
John Cameron	92	39
David Wright	95	40
Charles Carney	104	43
John Sullivan	110	46
Charles McEnery	113	47
G. Davis	116	48
Chas. H. Welch	118	49
Evidence for plaintiff in rebuttal	120	49
Testimony of James Artery (recalled)	120	49
James O'Neill (recalled)	120	49
Jerry Artery (recalled)	122	50
Defendant's requests as to instructions	125	51
Charge to jury	130	53
Exceptions to charge	156	63
Exhibit A—Statement of Jerry Artery, Mch. 23, 1886	164	66
B— " " " Sept. 1, 1886	166	66
C— " John H. O'Neill, Apl. 1. 1886	167	67
D—Diagram showing "Standard Plan of Cattle Guards"	169	67
Clerk's certificate	170	67
Assignment of errors	171	68
Clerk's certificate	178	70

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the northern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between James Artery, plaintiff, and The Chicago, Milwaukee & St. Paul Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Chicago, Milwaukee & St. Paul Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 27th day of June, A. D. 1887.

A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa.

Allowed:
O. P. SHIRAS, *Judge.*

b NORTHERN DISTRICT OF IOWA, *ss:*

I, A. J. Van Duzee, clerk of U. S. circuit court for northern district of Iowa, do hereby accept due and lawful service of this writ this 27 day of June, 1887, and file the same in my office this day.

A. J. VAN DUZEE, *Clerk,*
By ALFRED HOBBS, *Deputy.*

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to James Artery:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the northern district of Iowa, eastern division, wherein The Chicago, Milwaukee & St. Paul Railway Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Dubuque, in said district, this 27th day of June, 1887.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

O. P. SHIRAS, *Judge.*

d [Endorsed:] No. 291. Law. James Artery *vs.* Chicago, Milwaukee & Saint Paul R. R. Co. Citation. Filed June 28, 1887. Alfred Hobbs, deputy clerk.

UNITED STATES OF AMERICA,
Northern District of Iowa, Eastern Division:

I hereby certify that on the 27th day of June, A. D. 1887, at the city and county of Dubuque, in said district, I served the within citation on James Artery, within named, and on D. E. Lyon, one of his attorneys, by reading the same to each and by giving to each a copy thereof.

W. M. DESMOND,
U. S. Marshal,
By T. M. HOPKINS, *Deputy.*

Fees, $6.18.

1 Pleas before the circuit court of the United States for the northern district of Iowa, eastern division, at a term begun and holden at Dubuque, in said district, on Tuesday, the 5th day of April, A. D. 1887, before the Hon. Oliver P. Shiras, judge of the United States district court for said district.

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

JAMES ARTERY
vs.
THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY. } Law. No. 291.

Be it remembered that heretofore, to wit, on the 5 day of March, A. D. 1885, there was filed in the office of the clerk of the district court in and for the county of Dubuque a petition in the words and figures following, to wit:

Petition at Law.

DUBUQUE CO., *ss:*

In District Court. April Term, 1885.

JAMES ARTERY
v.
CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY.

2 1st count. Plaintiff, complaining of the Chicago, Milwaukee and St. Paul Railroad Co., a corporation organized under and

by virtue of the laws of Wisconsin and doing business in Wisconsin, Iowa, and other States, says, as his cause of action against said defendant, as follows: That said def't owns and operates a line of its road from Dubuque, Iowa, to La Crosse, Wisconsin, and St. Paul, Minnesota, and in the operation thereof uses locomotives propelled by steam, hand cars propelled by hand, and cars drawn by its locomotives; that the said plaintiff, on the 5th day of March, 1883, and for several months prior thereto, was in the employ of said railroad company, the defendant, in the use and operation of said road in the county of Allamakee, Iowa, in working upon its road and road-bed, in keeping the ties in good order, in keeping the road well and properly ballasted, in removing obstructions from its track, in keeping its culverts and crossings in repair, in keeping the iron on the road properly spiked and fastened, in keeping the road in good condition for use and safe operation for said defendant and its patrons, and to aid generally, doing all such work as is required of an em-
3 ployee or section man in keeping the road and road-bed safe and fit for use and operation along its line of road and right of way through said county of Allamakee, and in doing any and all of said work cars propelled by steam and hand cars were employed and used by this plaintiff and others in and about said work, which said cars were furnished said plaintiff and the employees by the defendant; and plaintiff says that on the 5th day of March, 1883, while in the employ of said defendant as a section man, engaged in the kind of work aforesaid, he left the village of Harper's Ferry, in Allamakee Co., Iowa, with some other employees, under a foreman of said defendant named P. Retshaw, as pl'ff now recalls his name, and went north some ten miles repairing the iron, ties, road and road-bed, bridges, crossings, and culverts of said defendant's railroad; that after doing said work and towards the evening of said day the said foreman ordered a start to return to Harper's Ferry on a small hand car, on which were placed seven or eight men, and more than said car could or ought to carry; that at the time the said hand car was ordered by the foreman to start for said Harper's Ferry it was started at the time and on the time that a train of cars was
4 then due, of which the plaintiff had no knowledge at the time; that on said 5th day of March the snow had been falling and there was snow in the rails, and the said foreman ordered plaintiff to get a shovel and seat himself on the front of said hand car and hold said shovel on the top of the rail, in order to move said snow as said hand car went forward; that on said hand car there were no places provided for the feet to rest upon while performing said duty; that the plaintiff was compelled, in order to hold said shovel, to exert all his strength and by muscular exertion hold up his feet and at the same time guide and hold said shovel.

And plaintiff says said hand car being so placed on said track on the time of said train as aforesaid, and with plaintiff placed by the foreman on said front of said hand car, as aforesaid, with said shovel, the said hand car was run ahead of said train, then due, at the rate of more than ten miles an hour, being a dangerous speed, and whilst so running the plaintiff, while holding said shovel and while cross-

ing over a cattle-guard in said road and without any fault, want of care, or negligence on the part of the plaintiff, his foot was
5 caught while holding said shovel, and by reason thereof he was thrown off and under said hand car, his body doubled up, his spine injured, and his backbone broken; by reason whereof he has been confined to his bed ever since, never having been able to work and having all the time since said injury suffered great pain in body and mind; all of which was caused to happen to him by reason of the want of care and the negligence of the defendant in furnishing unfit and improper hand cars, in requiring onerous and dangerous duty from the plaintiff, and in running said hand car at a dangerous rate of speed, and in overloading the same, all stated — aforesaid and all to the damage of the plaintiff in the sum of twenty thousand dollars, besides the sum of one thousand dollars for money paid out for board, care, & surgical and medical treatment.

Wherefore plaintiff prays judgment in the sum of $20,000, besides costs of action.

FOUKE & LYON,
Attorneys for Plaintiff.

And afterwards, to wit, on the 17th day of February, 1885, there was issued out of said district court in and for Dubuque
6 county, Iowa, an original notice in the words and figures following, to wit:

Original Notice.

To the Chicago, Milwaukee & St. Paul Railroad Company:

You are hereby notified that on or — the 1st day of April, A. D. 1885, there will be on file in the clerk's office of the district court of the State of Iowa in and for Dubuque county the petition of James Artery, claiming of you twenty thousand dollars and interest at six per cent. from Feb'y 1, 1885, as money due him from you for damages and injury to his health and person caused by your negligence and want of care in failing to have safe machinery and hand cars, and in failing to operate your said railroad safely and carefully in which said plaintiff was engaged in operating on the 5 day of March, 1883, the time he was so injured by your negligence and want of care.

And you are further notified that we claim an attorney's lien in the sum of five thousand dollars, money in your hands belonging to the plaintiff, for money due us from him for services rendered, and that unless you appear and defend before noon of the second day of the next April term of said court—that is to say, before noon
7 of the 28 day of April, A. D. 1885—default will be entered against you and judgment rendered thereon.

FOUKE & LYON,
Attorney- for Plaintiff.

STATE OF IOWA, } ss:
Dubuque County, }

I hereby certify and return that I received the within notice for service on the 17 day of February, 1885. I served the same on the within-named Chicago, Milwaukee & St. Paul Railroad Company by reading the same to James McGrath, agent of said R. R. company, and giving to him a true copy thereof in Julien township, Dubuque county, Iowa.

JAMES McCANN, *Sheriff,*
By N. J. LOES, *Deputy.*

Endorsed: Original notice. Jamas Artery *vs.* Chicago, Mil. & St. Paul R. R. Co.

And afterwards, to wit, on the — day of April, 1885, there was filed in the district court of Iowa in and for Dubuque county a petition for removal in the words and figures following, to wit:

8 *Petition for Removal to the Circuit Court of the United States, Northern District of Iowa, Eastern Division.*

In the District Court of Dubuque County, State of Iowa.

JAMES ARTERY, Plaintiff,
and
THE CHICAGO, MILWAUKEE & SAINT PAUL RAILWAY CO., Defendant.

To said district court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled cause exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Wisconsin, and that plaintiff, James Artery, was then and still is a citizen of the State of Iowa.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by
9 said circuit court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto.

And petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Iowa.

W. J. KNIGHT,
Attorney for Petitioner.

STATE OF IOWA, *Dubuque County:*

I, W. J. Knight, being duly sworn, do say that I am attorney for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

W. J. KNIGHT.

Subscribed and sworn to by W. J. Knight before me this 27th day of April, A. D. 1885.

[SEAL.] W. J. CANTILLON,
Notary Public.

10 And afterwards, to wit, on the 27th day of April, A. D. 1887, a bond for removal to the circuit court of the United States was filed in the words and figures following, to wit:

Know all men by these presents that the Chicago, Milwaukee & St. Paul Railway Company, as principal, and W. J. Knight, as surety, are held and firmly bound unto James Artery in the penal sum of five hundred dollars, upon the following express conditions: The said Chicago, Milwaukee and St. Paul R'y Company having petitioned the district court of Dubuque county, State of Iowa, for the removal of a certain cause therein pending, wherein said James Artery is plaintiff and The Chicago, Milwaukee and St. Paul Railway Company, defendant, to the circuit court of the United States for the northern district of Iowa:

Now, therefore, if the said railway company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall
11 well and truly pay all costs that may be awarded by said United States circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise of force.

Witness our hands this — day of April, A. D. 1885.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,
By W. J. KNIGHT, *Its Attorney.*
W. J. KNIGHT, *Surety.*

STATE OF IOWA, *Dubuque County,* } ss:

I, W. J. Knight, of said county, the surety named in the foregoing bond, do depose and say that I am a resident of the State of Iowa and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Iowa liable to execution of the value of more than five hundred dollars.

W. J. KNIGHT.

Subscribed and sworn to by W. J. Knight before me this 27 day of April, A. D. 1885.

[SEAL.] W. J. CANTILLION,
Notary Public in & for said County and State.

12 Endorsed: In district court, Dubuque county, Iowa. James Artery, plaintiff, *vs.* The Chicago, Mil. & St. Paul Railway Company, defendant. Petition and bond for removal to U. S. circuit court. Filed April 27, 1885. J. J. Dunn, clerk.

And afterwards, to wit, on the 28th day of April, 1887, an order of court was made and entered of record in the words and figures following, to wit:

Change of Place of Trial.

In District Court, Dubuque County, Iowa.

JAMES ARTERY
vs.
CHICAGO MILWAUKEE & ST. PAUL R. R. Co. } Law. 6860.

TUESDAY, *April* 28, *A. D.* 1885.

This cause now coming on to be heard upon the petition by defendant for removal of this cause to the circuit court of the United States, and the same being submitted, is by the court granted and the bond approved. It is therefore ordered by the court that this cause be, and the same is hereby, removed to the circuit court
13 of the United States, northern district and eastern division of Iowa, and that the clerk of this court forward a transcript of the papers and record entry herein to the clerk of said U. S. circuit court upon defendant's paying the costs occasioned by said change.

Fee Bill.

1885, March 5. Ap'l T., 1885.

Filing, &c., p'd by F. & L.	1 50
Copy fee	10
Sh'ff McCann on notice	80
Transcript to U. S. C. C.	3 50
Fee, entry, &c.,	1 20

STATE OF IOWA, } *ss:*
Dubuque County, }

I, J. J. Dunn, clerk of the district court of the State of Iowa in and for Dubuque county, do hereby certify that the annexed and foregoing is a full, true, and complete compared transcript of the records, pleadings, and papers therein set forth in the case herein mentioned, wherein James Artery was plaintiff and The C., M. & St. Paul R. R. Co., defendant, as fully as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Dubuque city, this 21st day of November, A. D. 1885.

[SEAL.]

J. J. DUNN, *Clerk*,
By J. M. WERNER, *Deputy*.

14 And afterwards, to wit, on the 15th day of March, A. D. 1885, there was filed in the United States circuit court for the northern district of Iowa, eastern division, an amended petition in the words and figures following, to wit:

In Circuit Court of the United States, Northern Dist., Eastern Division, Iowa.

JAMES ARTERY
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY.

And the plaintiff by leave of court amends his petition by further alleging that the hand car furnished the foreman by defendant on said 5th day of March, 1883, was not constructed with reasonably safe appliances, apparatus, and machinery to push the snow off from the said rails; that the same was wanting in said proper and necessary appliances in this behalf, which could easily have been applied by defendant, and said hand car was wanting in the proper kind of a brake, and the proper kind of a foot-rest and appliances for those who were ordered to occupy the position and do
15 the kind of work plaintiff was ordered to do, such as is alleged in the original petition; and plaintiff further avers that when he was ordered by said foreman to sit down on the front of said hand car and hold said shovel he was wholly unaware of any danger therefrom and had reason to believe and did believe said hand car would be run by said foreman at a safe rate of speed, after being so ordered by said foreman; but, on the contrary, was run and propelled at an unreasonable and unnecessarily fast and careless and dangerous speed, which said speed plaintiff could not control, nor could not leave said car while in motion; that while so being propelled at said dangerous speed over said cattle-guard, where plaintiff was injured, he was thrown under said hand car and injured for life, as alleged in said original petition; that said cattle-guard was made of three-corner pieces of wood and placed negligently and wrongfully on top of the ties accross the track instead of lengthwise, and some of which said three-cornered pieces stood above or higher than the surface of the rail, but which the plaintiff
16 was not aware of at the time of his injury or before; that said cattle-guard was carelessly and negligently constructed as aforesaid, and by reason whereof and the speed of said hand car and the dangerous and tiresome position in which defendant ordered and placed plaintiff he was injured for life, as stated. Either by his foot or feet coming in contact with said rail or said three-corner pieces or by the shovel given him by defendant getting caught on the rail or

said three-corner pieces, or by all of these circumstances, he was thrown under said hand car, all by the want of care on the part of said defendant, as heretofore stated herein and in the original petition, and without fault, negligence, or want of care on the part of plaintiff, for which he demands judgment as asked in the original petition.

FOUKE & LYON,
Att'y- for Plaintiff.

Rec'd copy of within this 15th day of March, 1886.
W. J. KNIGHT,
Att'y for Pl'ff.

Endorsed: U. S. circuit court, N. dist. of Iowa, eastern div., Iowa. James Artery *vs.* Chicago, M. & St. Paul R. R. Amendment to petition. Filed 15 March, 1886. A. Hobbs, dep. clerk. Fouke & Lyon, att'ys for pl'ff.

17 And afterwards, to wit, on the 18 day of November, A. D. 1886, an answer was filed in the words and figures following, to wit:

In U. S. Cir. C't.

JAMES ARTERY
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Nov. 7, 1886.

Answering plaintiff's petition, defendant says:

1st. It denies each and every matter and thing therein stated.

2. It avers that the injury complained of, if any, was caused by the want of care and caution of the plaintiff, which directly contributed to the result.

3rd. It avers that plaintiff entered its service as a section man, and that the work he was doing at the time of the alleged injury was such a section man is called upon to perform in the discharge of his duties; that at the time plaintiff started to ride on the hand car, as alleged, he was and for a long time prior thereto he had been acquainted with defendant's track, road-bed, and cattle-guards on the section on which he was working, as alleged, and with
18 the condition and manner of construction of the same, and with the hand car and its manner of construction and appointments on which he was riding at the time of said alleged injury, and, knowing all of these things, had for a long time prior to said alleged injury to him worked on said section and with said hand car without objection or complaint.

BURTON HANSON &
W. J. KNIGHT,
For Def't.

Endorsed: James Artery *vs.* C., M. & St. P. R'y Co. Answer. Filed Nove'r 18, 1886. A. Hobbs, deputy clerk.

And afterwards, to wit, on the 6th day of April, A. D. 1887, the following entry was made of record, to wit:

JAMES ARTERY
vs.
CHICAGO, MILWAUKEE & ST. PAUL R'Y CO. } Law. No. 291.

This cause coming on to be heard, the plaintiff appearing by Fouke & Lyon, his attorneys, and the defendants by Burton Hanson, Esq., and W. J. Knight, Esq., *his* attorneys, thereupon came a jury of twelve good and lawful men, citizens of the district,
19 to wit, E. B. Raymond, P. H. Pierson, Geo. W. Miller, Stephen Radford, A. F. Bort, O. Dana, Hugh Kepler, Geo. B. Crittenden, A. Embley, W. Cavers, J. L. Chase, and C. H. Patterson, who were duly empannelled and sworn well and truly to try the issue joined and a true verdict to give according to the law and the evidence. The hearing of the testimony was not concluded at the hour of adjournment.

And afterwards, to wit, on the 8th day of April, an entry appears of record in the words and figures following, to wit:

JAMES ARTERY
vs.
CHICAGO, MILWAUKEE & SAINT PAUL R'Y CO. } Law. No. 291.

This cause again coming on to be heard, the jury and counsel being all present and the evidence and the arguments of counsel having been heard, the cause was fully submitted to the jury by the court, and the jury, having heard the instructions of the court, retired to consider their verdict, and after due deliberation they returned into court the following verdict, viz:

JAMES ARTERY
vs.
20 THE CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at thirteen thousand five hundred dollars ($13,500).

GEO. W. MILLER, *Foreman.*

And afterwards, to wit, on the 23 day of June, A. D. 1887, an entry appears of record in the words and figures following, to wit.

JAMES ARTERY
vs.
CHICAGO, MILWAUKEE & SAINT PAUL RAILWAY CO. } Law. No. 291.

This cause coming before the court upon defendant's motion for a new trial, heretofore argued and submitted to the court, *and* the court, being now fully advised in the premises, overrules the same.

Thereupon, the bill of exceptions having been settled, the same is signed by the court.

It is therefore ordered and adjudged by the court that the said plaintiff, James Artery, have and recover of and from the said defendant, The Chicago, Milwaukee & Saint Paul Railway Co.,
21 the sum of thirteen thousand five hundred dollars ($13,500), together with the costs of this suit, taxed at $—, and that a writ of error and supersedeas be allowed on defendants filing a bond in the sum of ($15,000) fifteen thousand dollars.

And the bill of exceptions so filed as aforesaid on the 23rd day of June, A. D. 1887, was in the words and figures following, to wit:

United States Circuit Court for the Northern District of Iowa, Eastern Division.

JAMES ARTERY, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Be it remembered that on the 6th day of April, 1887, it being a day of the regular April term of the circuit court of the United States for the northern district of Iowa, eastern division, the above-entitled cause came on for trial and was tried *to* a jury, and on the trial thereof the following proceedings were had:
22 The plaintiff, to sustain his side of the issue joined, was sworn in his own behalf and testified as follows:

I am the plaintiff in this case. I am 30 years of age. Previous to the 5th of March, 1883, I lived in Aliamakee county, Iowa. My business was railroading, part of the time. When not railroading I used to work on a farm. I ran on the Mississippi river awhile. Previous to March, 1883, I always had good health. Prior to the accident I weighed 158. I could do anything. On the 5th day of March, 1883, I was in the employ of the Milwaukee Railroad Company, working on the repairs on the section, under a section boss, Pat. Rellehan. I had worked, off and on, for seven summers. I had been laid off in the fall of 1882. I quit work, I think, in the latter end of October or some time in November. I went to work again the latter end of February, 1883, or 1st of March. I couldn't say. I was at work on the section that commenced at Harper's Ferry and ran north. I think the section was about six miles long. Anton Donalan, Johnny Kennedy, Jack O'Neill, and Jerry Artery, my brother, worked on the section with me—five of us besides the foreman. On the 5th of March we started out about 7 o'clock
23 in the morning. We came back to our dinner, and, I should judge, about half past 12 or close up to 1 we started out, in the afternoon. We went up the section about 4 or 4½ miles or 5. I couldn't say. That afternoon we were cleaning out ditches alongside of the track. It was a dark day—kind of cloudy all day—until about 1 or half past 2 or 3 o'clock it started to snow heavy. I had no watch or time-piece, but I think it was about a quarter after five

when Rellehan gave the order to put on the car. He told us to pick up our tools. He says: "Boys, pick up your tools and put the car on the track." We were going home to Harper's Ferry. At that time I should think there was an eighth or pretty near a quarter of an inch of snow on the rails. It was piled up, you know, the snow was. It wasn't really wet snow, but kind of soft, you know, and lay right there on top of the rail. It covered the rail up good. We couldn't pump the hand car any. We started her up and the wheels would spin all around. They wouldn't go ahead at all; the wheels would slip on the rail. We was there maybe a minute trying to start; maybe more. Then Mr. Rellehan turned around and he says: "Boys, this will never do." He says to me, pointing to me: "You get that shovel and go
24 there and hold it onto the rail and knock that snow off." I couldn't say what he said to the other man. Kennedy sat on the other side and I sat on the left-hand side coming towards Harper's Ferry. I got the shovel. I believe that Johnny O'Neill handed the shovel to me. I sat at the corner of the car holding my feet up that way and the shovel on the rail at the same time. Pat. Rellehan, the boss, told me to get there. I had nothing in the world to hold my feet up. I held the shovel right on the top of the rail, that way, so as to knock the snow off. It was one of those common shovels—railroad shovel. I should judge the shovel, handle and all, ain't over three feet; might be, maybe, more. The width of the blade is about a foot, I think, if it is that. I couldn't say. I held my limbs up that way and held the shovel right on the rail. We came along about three miles, I think, or three and a half—I couldn't say—when we came to this cattle-guard; and there was what they call a ribbon. They nail them on top of these ties across the cattle-guard. There was pieces on the outside of the rails, and then a piece that went from one rail over to the other, right
25 across the center of the track. In the winter time the frost used to draw the rails, and those pieces used to cock up more or less. Some of them was all knocked off, and two or three in the center of the track that wasn't knocked off. I couldn't say whether it was my foot catched one of those ribbons or the shovel, I was whipped under it so quick. By reason of the fact that my foot was caught or the shovel was caught I was whipped under the car. I was all doubled up. When I came to find out my foot and my right limb was drove up, clear up to my ankle, between the bottom of the car and the brake. My brother took the spike maul and broke the brake off to get me out. At the time of the accident the car was going over 7 miles an hour—even faster. She was going that good, if not faster. We crossed a bridge just before the accident. It was longer than this room. There was snow on the rails upon the bridge. We had to hold the shovel on the bridge. It was, maybe, a hundred yards from the bridge to the cattle-guard, I think. After I first commenced to hold the shovel we came down about a mile—I think a mile and a half; maybe two miles—when Kennedy's shovel catched on a joint and whipped out of his hand, and they stopped the car there. It

26 near whipped him under, too. He got off and got the shovel and got on again, and we started up. During all this time Mr. Relichan, the boss, was on the front of the car, right over me—between me and Kennedy. He was pumping the car as hard as ever he could pump. I don't recall hearing Rellehan say anything about running the car while we were on the trip. When I held the shovel on that way the snow flew right up on the shovel, and maybe sometimes it would clog up that I would have to lift the shovel and I had to throw her off and get her back on the rail again. The speed of the car throwed the snow right up against the corner of the car—right up along the handle of the shovel and up on my hands. At the moment the accident occurred I was holding the shovel on the rail, where the boss put me and told me to sit. At the time the accident happened my attention was fixed on my work and I was doing everything I could to carry out the orders of the boss. Right after the car run up on top of me I couldn't say I was conscious. I was conscious when they got me out from under the car. They laid me alongside of the track in the snow
27 until the train passed. I know I had recollection enough to remember that my brother took the spike maul and broke the brake to get my limb out. They took me off of the middle of the track and laid me right out in the snow on the side of the track. They took the car off and the train passed by. I should think that it wasn't any more than, maybe, 15 minutes after the car was taken off that the train passed by, if it was that. I don't think it was; I couldn't say. After the train passed they put the hand car on and picked me up and laid me on the car and took me to Harper's Ferry. There they laid me on a car door and took me over to Jack O'Neill's, about a hundred yards or so from the depot. I was at O'Neill's about five weeks. I needed attention during that time. Johnny O'Neill, my mother, and my brother were all waiting on me, and then some of the neighbors around there sat up with me. During that time, as to suffering, I was terribly bad. They used to have to draw my water and everything. I was in terrible pain here in my back; continued pain there all the time. They used, four or five, to put me in a sheet or comforter and they would get around the comforter and lift me out of bed to make my bed.
28 This pain & suffering continued during all the time I was there. I had two doctors, Dr. Nolan and a doctor from Lansing. At the end of the five weeks they took me down to Dubuque, to Mercy Hospital, where I have been ever since. I have been suffering rheumatic pains all down through my back and limbs. I can't do nothing for myself in the world. I am paralyzed from right here (hips) down; have no use of my limbs or feet. I can't control them in any way, shape, or manner. I haven't been able to stand on my feet since the accident. I have to have a nurse attend to me all the time; $2,000 would not clear my expense at the present day for attendance and nursing and doctor's bill. I have no more use of my limbs now than at any previous time since the accident. There is no improvement in my condition, so far as the use of my limbs is concerned. I can span my thigh here if my

pants was off and can span the calf of my leg clear around; nothing, only the bone. I think I had been to work about three or four days before this accident occurred.

Q. Had you ever been ordered to hold a shovel on the rail before?

Objected to by defendant as incompetent, irrelevant, and
29 immaterial; objection overruled; exception by defendant.

A. No, sir.

Q. Had you ever seen a shovel held on the rail before, sir, for the purpose of cleaning the track of snow?

Objected to by defendant as incompetent, irrelevant, and immaterial; objection overruled; exception by defendant.

A. No, sir.

Q. Did you know anything about the hazard or danger connected with the holding of a shovel in that way?

Objected to by defendant as incompetent, irrelevant, and immaterial; bjection overruled; exception by defendant.

A. No, sir; I did not. I went and sat on the corner of the car and held the shovel because the boss told me. The wages I was earning at the time of the accident were $1.15. Sometimes during the summer months my wages would be a dollar and a half; I have got more than a dollar and a half, but not working on the section. When we was track-laying or doing different work on the road I got $1.75 and as high as $2.00. When in good health I have earned from $1.15 to as high as $2.00 a day. I never was sick before
30 this time. The boss did not give me any direction as to the manner in which I should hold the shovel; only he just told me to hold the shovel on the top of the rail to throw the snow off; clear the snow off the top of the rail so as they could pump in the car. He gave me no specific direction as to the manner in which I should hold it.

Cross-examined:

From the time the car started till I fell off it stopped once that I have recollection—stopped when Kennedy's shovel flew out of his hand. I don't remember the car stopping at two curves to listen to the coming train. From the place where the car started to the point I fell off I should think was about 3 or 3½ miles. From the point where the car started to the point where Kennedy's shovel was whipped out of his hands I think was about a mile or a mile and a half. It was whipped out of his hand and flew out to one side. The wheels of the car are outside the body of the car. The corner of the car is right up on a line with the rail, inside of the rail. I was holding the shovel on the flat of the shovel head. The car wheel was a little back of the end of the car. I held the
31 shovel in front of the wheel, and the wheel was outside of the body of the car. I had the shovel flat on the rail to take the snow from the top of the rail. The edge of the shovel was on the

rail, slanting; the shovel was slanting from me. I was looking out so as not to catch in the joints of the rail, but after he started up—maybe five or six rails—with the snow no man could see the joints of a rail the way it was running. I had in mind to look out for the joints of the rail. I didn't think about if the shovel got in the joints of the rail it would, probably, take it out of my hand and throw me off the car. I couldn't say that I knew some accident would happen if it got in the joints of the rail, either. I was looking out for the joints of the rail so the shovel wouldn't catch. I had in mind that the shovel might catch in the joints of the rail, but after she started up you couldn't see the joints of the rail. From the time we started until I met with this accident I had no talk with Rellehan. I couldn't say really what threw me from the car; whether it was my heel striking on the ribbons or shovel catching in the joints of the rail. It was either one or the other. I was whipped so quick
32 under the car I couldn't say. I had no experience as a section man on any other railroad but the Milwaukee road. I had been working on this section the summer before; I believe I had the summer before that. I was there two summers; I was track-laying along that river division the summer before; I think two summers—1881 and 1882—and started again in the summer of 1883. I have been over the section; of course, I couldn't say I know all about it. I might not be an experienced railroad man that way, to know all about everything. During these summers I was working on the section I was over it frequently; took the hand car and went with the section crew to work on the section daily. I was out on it, except Sundays, from one end of the section to the other. I know the cattle-guards on the section were there. I saw the ribbons on the cattle-guards before the accident, but I never took particular notice on them. I saw the cattle-guards fixed with ribbons, as I have described. The headquarters of the section crew was Harper's Ferry. We kept our tools there, some of them, and more of them they would leave out along the section. We left the car there
33 nights. I couldn't say how often. The tools were left out along the section lots of times. I couldn't say if it is against the rules of the railroad. I never had the laws. I know of the lining bars and picks, shovel, spike maul, gauge, and level being left. They would be hid. When the section crew goes out to work they take the hand car with them. It is in daily use on the section. We had it out on the section these days I was there before the accident. I saw this hand car I fell from and rode on it during those days. From the last of February till the 1st of March I saw it; but that ain't the hand car that was on there the fall before. It was a new hand car that was put on in 1883. I rode back and forth on this hand car for two or three or three or four days that I worked. I couldn't say it was a new hand car. It wasn't the same hand car that was on the fall before when I left the section—a different make, different pattern. There was a different arrangement about the levers of the car, and I should judge it was about half a foot
34 shorter, if not more, than the car that was there the fall before. The section crew had ridden on this car over the

section out and back from our work the few days before the accident happened to me. I couldn't say whether all were out or not. I know there were some days. There was five of us the day I got hurt. There was a car-house at Harper's Ferry. Most of the men lived at Harper's at the time of the accident. When the accident happened we were returning to our home after quitting for the day. He told us to put on the car. He didn't tell us to go home or where we was going. I couldn't say we were going home after our work. We were going towards Harper's. He might go down, maybe, half a mile beyond that, and have something else to do. It wasn't late. It wasn't getting dark. I didn't believe in my mind when we started that the day's work was ended and we were going back to Harper's for the night. I didn't say Rellehan said, "We won't get home to-night, boys, if you don't get the snow off the track." He says, "This will never do, boys." He didn't say anything about getting home. I didn't testify before that I know of that he said, "This will never do, boys; we won't get home to-night." I don't know whether I said that or not; not that I remember of. I don't know what hour it was when we started. I had no watch. I should judge it was a quarter after 5 or so. I believe the day's work generally ended at 6 o'clock. This snow that day was not a drifting snow. It laid right where it fell. There was a little wind—not much; not enough to blow it off the rails. I would sometimes take the shovel off the rail and get the snow off it. It wouldn't stick to the shovel. You hold it on and the force of the car—the snow would slip away back up along the shovel. I never struck no shovel on the tie; not to my recollection. If I lifted the shovel up and throwed the snow off of it I didn't strike it on no tie, nor I couldn't do it. There was three men and the foreman pumping the car. The foreman stood between Kennedy and I, on the front of the car. I saw one time he was pumping; had hold of the lever as it went up and down. I am positive sure the man was pumping the car. I saw him once or twice, sure, anyhow, putting force on the lever; because, you know, he stood right in between us, and you could feel him every time he would come down. He must put force on it.

Thereupon the plaintiff called JOSEPH G. MOORE, who, being duly sworn, testified:

I live in Dubuque; am a teamster here. I was engaged in railroading 25 or '6 years, as a locomotive engineer. I have seen hand cars used on railroads a good many times; know all about them. I have seen men use brooms down in front of the car to sweep the snow off a good many times. If there was half an inch or less of snow on the rail a freight train running over the track would naturally clear the snow off. It would be a great deal easier for a hand car to follow the freight train than to go ahead of it.

Cross-examined:

That is, if the snow was cleaned off the rails in any way it would

be easier to propel the hand car than to attempt to propel it before the snow was cleaned off the rail. When the snow is off it would be a great deal easier than when the snow is on; whether it was taken off by a train or a man goes along the track and brooms
37 it off or it thaws off. It is the difference of the snow being on the rail or off the rail. I think these brooms I have seen were generally temporarily fixed on by the section men. I don't remember of ever seeing but one car that had a broom on it stationary. I recollect once, on the Northwestern railroad, of seeing a broom on a hand car. The section men had put it on. They used to put them, a great many years ago, on engines, behind the pilot, in front of the wheels, and I recollect once, on the Northwestern road, of seeing a hand car fixed in that way. I don't know that I ever saw only one. I don't really know whether the section men put it on or the company. That is the only one I saw put on stationary for that purpose. That was nearly 20 years ago.

Re-examined:

Q. You have seen them since that time?

A. Oh, there is men using brooms.

Q. I would ask you if it would be a difficult piece of work to fix on the end of a hand car a place for brooms to be held?

Objected to by defendant as incompetent, irrelevant, and immaterial; objection overruled; exception by defendant.

38 A. Oh, no; it wouldn't.

Q. It need only be fixed on one end; the hand car is of such light weight they can turn it?

A. Oh, yes.

Recross-examined:

I couldn't tell why brooms have not been put on, I am sure. I never worked on a section. I have run a hand car a little, but never had anything to do with snow business. A man would have an idea, running an engine fixed in that way, how a hand car with the broom fixed by the section men would work if the snow was a little damp on the rail. I know how a broom would work on an engine. I don't know why it wouldn't work as well on a hand car as an engine if it was put on. There is a difference between the power which propels one and the other. As far as the matter of propelling a broom on an engine and on a hand car worked only by the men standing on the car is concerned, they could shove the broom—most anything rather than shove the car through the snow. I have seen a broom used where the snow was damp on the rails, and I have seen shovels used to scrape it off—section men
39 sitting down on the front of the car scraping on the rail. I have seen such things done. I don't know how often.

Re-examined:

Q. Is it safe or unsafe to use shovels on a hand car?

Objected to by defendant; objection sustained.

Thereupon the plaintiff called JERRY ARTERY, who, being duly sworn, testified:

I live about a mile and a half west of Harper's Ferry; I am a brother of the plaintiff; I was 32 years old last Christmas eve. My brother lived in the same neighborhood with me during all the time, since we have been children, up to the time of this accident. Jimmy and I are twins. Prior to the 5th of March Jimmy's health was good all the time. I never knew him to be sick, only once as I remember of. He was sick about a week with the ague or something. As to being an able-bodied man, capable of doing work, he was good. I have worked on the railroad about eight years steady; that I never done anything else, and then I have worked on
40 the railroad up to this day, since I was 15 years old—pretty near; but I have worked at it about 8 years steady; worked six years on that section. In March, 1883, I was a section hand on the Milwaukee road. Pat. Rellehan was my section boss. I belonged to the same gang as my brother. I recollect the day he was injured, the 5th of March, I think. in the afternoon of that day we were working about 5 miles north of Harper's Ferry. We took a hand car to get from Harper's Ferry to our work. It was a pretty nice day; it was a little bit cloudy. I believe in the morning—I don't know really what time it was, but a short time after noon—it started to snow. Sometimes it fell pretty heavy and sometimes kind of light, and it used to thaw away nearly as fast as it would fall. We stayed at work that day until somewhere's near 5 o'clock or a little after. I think we were together pretty near all day.

Q. What orders, if any, were given to the boys as to getting the car on the track and starting back?

A. As near as I can give it, he told us boys to put the hand
41 car on the track, and we put the hand car on the track, and tools, of course, on the car, and we tried to pump her home and it wouldn't move. We got off and shoved it a little piece and tried again to pump it. The wheels would spin around and it wouldn't go. We couldn't make the car run by pumping. He says, "Boys, this will never do," something like that; and I ain't sure whether he said, "We will never get home" or not. "Two men," he says, pointing around, "get shovels and hold the shovels on the rail." I think he mentioned Jim. He was right next to him and O'Neill was behind and Kennedy. I think O'Neill took the shovels up, and he handed one to Jimmy and Kennedy took the other one. Then we got on the car and after we run her a little bit, two or three rail lengths, it run pretty good with the shovels on. We went before the accident happened, maybe about two miles or two and a half. After we got the car going Mr. Rellehan used to say once in a while, "Boys, sock her through; give her the gun, fellows, give her the gun." That used to be a word he would have to say whenever he would want anything done in a hurry or with a rush. We
42 came along towards Harper's on the car, and I ain't sure whether he stopped at a curve, down about a mile from where we started or not, and listened for a train, because it is a kind

of a short curve there and we couldn't see very far each way, and after we got down a little further Kennedy's shovel was knocked out of his hand. I think it was jerked off. He stopped the car then and we got Kennedy's shovel and he started up again, and about half a mile below that was where Jimmy was thrown off from the car. We were coming along pretty fast on the car just before we came to that crossing, and I says to Rellehan, "We are going too fast; some of the men will get hurted." And Rellehan says, maybe about a minute or so afterwards, "Give her the gun, boys, give her the gun." And we were going, I should judge, between 7 and 8 miles an hour, good, when Jimmy was jerked off the car, because it threw the hind end of the car clear around on the track, right off the rail, and it dragged him about 22 feet or maybe 25 feet right under the car until it came up to the crossing plank, and it wedged him
43 in right against the ends of the crossing planks. Of course, we were all excited and jumping around there trying to get him out from under the car. We tried to pull him out easy. We couldn't get him out. Some one seen the train coming and Kennedy hollered to me. He says, "Ain't you going to save your brother? Can't you get him out of there?" So I got the spike maul and hit the brake with the maul and broke the brake off the car, and we got him out from under the car and the car off the track and him.

We just got him off the track, anyway, just as the train came right up—came right past. Rellehan did send a man; he got maybe ten feet fa-ther than the door of the court-house, back with a flag to flag the train, and he saw she was so close he couldn't stop her—it is kind of a down grade there—and that some of us would have to carry him. He was lying right on the snow; there we left him, with a coat or something under him.

The train went on—didn't stop. When we got my brother out from under this wreck he was doubled up right in under the car. When we was knocking off the brake the car kind of shoved
44 back off him. He was doubled right under when we got off the car. The car kind of run back a foot or so off his body. Sometimes we run cars faster than 7 or 8 miles an hour and some more times we couldn't run it as fast—according as the wind was blowing against us, you know. If it was a calm day and no wind, why we could run that fast—6 or 7 miles an hour. Mr. Rellehan had a watch; I think he had a time-card. I don't remember that anything was said, at the time the car was put on the track, that there was a train due. Before we stopped at the curve that I say I think we stopped at I don't remember of Mr. Rellehan saying anything about the train being due. We might have been two minutes, maybe, trying to get him out from under the car, and then in a few minutes the train came. From Harper's Ferry to the next station, where there is just a side track, is about 7 miles and a half. To run a freight train over the rails where the snow is half an inch or less clears it all off. It would be easier to pump the hand car after the freight train had passed. Whether it would be necessary to hold shovels, brooms, or anything else on

45 the hand car if it followed in the wake of a freight train depends upon whether it is snowing real hard. Sometimes we put cars on the track after a train had run by and it would run. You could run it just the same as if there was no snow at all, but if it was snowing real hard and you put it on you could only run a little ways until it would be as bad as ever. This snow continued to come down until Jimmy was hurt; it was snowing until we got to town. It would have been better in running the hand car to follow in the wake of a freight train. I have seen brooms used upon hand cars on the Milwaukee road. I don't really know how often; a good many times. Very near as long as I have been on there we used brooms. I don't believe I ever saw shovels used before that day. I am sure I never saw shovels held on the rail like that before. After we got to the station we took my brother on a grain door over to Johnny O'Neill's. He stayed there five weeks. Me and Johnny O'Neill and my mother attended to him, and a sister of mine part of the time. The first week I was there mostly all the time—day and night. He required constant attention all the time he was
46 up there. We had to turn him. Had to be one sitting right at the bedside. He couldn't speak or anything. I never saw any one suffer as he did. He moaned all the time—a great part of the time. I have noticed these ribbons on the cattle-guard. There is a frame-work over the cattle-guards; it is a regular culvert like. The ribbons, which are three-cornered pieces of wood nailed with the flat side onto the ties, run lengthwise of the tie. I never measured how close they came to the rail; they run inside and outside on the tie, and they are sloped off, scalloped off, right on each side from the ball of the rail, tapering off a little bit. The bottom of them dosen't come up against the rail on the tie. We tried the shovel after Jimmy was hurted; but we came along kind of fast and shoved it. We couldn't shove it through there without sticking on the ribbon. I tried that with the shovel myself, at this very particular place, walking. It was maybe a week or three weeks—some time after Jimmy was hurt. I don't really know what time it was. The ribbons hadn't been changed any between the time of the accident and the time I tried it. You could walk and be very careful and run
47 the shovel along, but it would catch on the ribbon if you would go anyway fast at all. You could hold the shovel far enough on the rail to avoid the ribbon.

Q. But was or was not the shovel wide enough to have caught hold of the ribbon and at the same time covered the rail?

A. Be on the rails, part of it, yes, sir; and we looked, furthermore, to see whether there was a joint or what it was caused it, but there was no joint in the rail—not on the cattle-guard—not at the place where this accident happened. I never took notice as to whether the top of the ribbons was even with or above the ball of the rail, only just in the shovel catching on it that way. I never got down to sight or look and measure at all. I don't know whether the ribbon was above the ball of the rail or not. I thought it was when the shovel catched. This hand car had two handles for pumping. They were at each end of the car. The handles ain't very far from

the end of the car, because you sit down on the front of the car. You have to keep your back stooped a little way or the handle will hit you in the back. The old cars were a little longer. You
48 could sit up straight on one and they wouldn't bother you at all. You couldn't do it on this car. During the time we were running down there Rellehan was standing between Jimmy and Kennedy and I was pumping and standing right by Jimmy, at his back. Rellehan was pumping with one hand—part of the time with two. When he pumped with one hand he looked ahead. When we used brooms up there on our section we put on a piece of 2 by 4 across in front of the car and bored two holes in it and stuck the handles of the brooms up through; that answered the purpose good. It did not interfere in any way, shape, or manner with the use of the car. I think we had brooms on that car before that winter. If the two by four — were put on top of the car all the time, if a person was lugging iron, it would throw the weight of the iron more on the hind part of the car; but it can be put under. We always put it under. There was nothing on this car in front, where Jimmy was ordered to sit, upon which he could rest his feet while he was holding the shovel. We never attended to the ribbons on the cattle-guards while I was on that winter, but we did after-
49 wards—not the ribbons, but a kind of guard fixed upon each side on the fence. We never had anything to do with the ribbons—not while I was on there that time.

Cross-examined:

I don't really recollect how long after the accident I went to the cattle-guard. It might have been two or three weeks; maybe a month; not any longer than that. I just went there to try it—to see if it was the joint or ribbon that throwed him off the car. I didn't say while I had the shovel flat on the rail it wouldn't touch the ribbon. I said that I tried the shovel on the rail, and by walking right along with the shovel in my hand on the rail that it catched on the ribbon. I had the shovel more on the side of the rail than I ought to by walking. That shovel is bound to play on the rail. It did, right in my hand; not very much. It played a little; it played enough. I didn't leave it play. I couldn't hold it the way you indicate, nor no other man could hold it that way. A man can't walk on that track or ride on that car and hold that shovel there on the rail without having it play on the rail. I don't know whether it would play on the rail if he had a steady
50 hold of it. It played just the same—enough to catch the ribbon. When I went there a month afterwards I didn't look to see whether there was any marks on the ribbons where the shovel struck. These ribbons are made out of pine. There was marks and pieces torn out of them; I couldn't tell whether the shovel did it or not. Bolts and lots of things coming along there tears pieces out of them. Some of them were out altogether. There was pieces tore off them side of the rail, near each rail. I noticed them on the inside of the east rail. Well, right in the center I couldn't say I saw any mark there that indicated to me it had been hit with

a shovel held in my brother's hand. These ribbons are beveled. I can't tell how far the top of the bevel is from the ball of the rail; I never measured it. I think it is four inches and a half from the face of the tie to the top of the ribbon; I never measured it. Just before we started Rellehan said: "Get shovels and hold them on the rail to clear the snow off." I don't remember his saying anything more. I ain't sure whether he mentioned any name or not, but it kind of runs in my mind that he says, "Jimmy, you
51 get a shovel." I might have testified on the last trial that he said: "This will never do, boys; two of you men get your shovels and hold them on the rail to clean the snow off." I guess I did say it. I don't know for sure whether he said this would never do or not, but he said something like that any way. "Get your shovels, boys, and hold them on the rail," he says; "hold up your feet." The time the car stopped, when we listened for the train, was before Kennedy's shovel was taken out of his hand. I don't now remember whether we stopped more than once to listen for a train. It was snowing, and continued to snow until we got to Harper's Ferry. I don't know how many days before, but I remember being up that winter and cleaning the ditches out. The water was running down off the bank.

Q. On the 23rd of March, 1886, at Harper's Ferry, in the presence of Mr. Buell, did you sign a written statement stating what you knew about this case and about the accident to your brother after the written statement had been read over to you?

A. Yes, sir.

Q. I will show you now the written statement and ask you
52 whether that is your signature?

Written statement shown the witness hereto attached and marked Exhibit "A."

A. That is my signature there.

Q. In the written statement which I have just shown you you state as follows: "At the time Jim got hurt we were running from 4½ to 5 miles an hour—certainly not to exceed 5 miles." Is that statement correct?

Objected to by plaintiff; objection sustained.

The grounds upon which the court sustained the objections to interrogatories to this and other witnesses, based upon a written statement signed by the witness and to the introduction of the written statements themselves were—

That it appeared that the statements were not volunteered by the witnesses, but that the company had sent its claim agent, after the happening of the accident, to examine the employees of the company who were present at the time of the accident in regard to the transaction; that the statements made by the witnesses were not taken down in full, but only a synopsis thereof made by the agent, the correctness of which is questioned by the witnesses in some particulars, although such written statement was signed by the witness.

53 That upon the trial of this case these statements thus obtained were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited; that it is apparent to the court that whether so intended or not these statements become a ready means of confusing and intimidating witnesses before the jury, and that if it be permitted to parties to thus procure written statements in advance from witnesses and then use the same in examining such witnesses it will enable parties to shape and control the evidence in a cause by committing the witnesses to particular statements, couched in the language not of the witness, but of the person carrying on such *ex parte* examination.

That these growing abuses can only be prevented by entirely excluding such statements thus procured from being introduced in evidence for any purpose.

That if the party desired to impeach a witness by showing contradictory statements made by him the person to whom or in whose presence such alleged contradictory statements were made should be called as a witness so that opportunity might be afforded of
54 placing before the jury the statements actually made by the witness sought to be impeached and not a mere synopsis thereof made by another person, and the accuracy of which, in some particulars, was challenged.

Exception by defendant.

Q. Did you, at Harper's Ferry, in the presence of Mr. Buel, on the 23rd of March, 1886, state, "At the time Jim got hurt we were running from 4½ to 5 miles an hour, certainly not to exceed five miles?"

A. First I didn't, and then I said that afterwards just to get rid of him; that is how it was; that wasn't true—not what I thought was true, anyway. Mr. Buel was present. Mr. O'Brien was also present, the agent.

Q. Did you, on the 23rd day of March, 1886, at Harper's Ferry, in the presence of Mr. Buel, make this statement: "I don't know if Jim ever sat down on the car before. I have often done it." Did you make that statement?

A. Yes, sir; I believe I did. It was not true.

Q. Did you, on the occasion I have reffer-ed to, say "that the snow was soft and sticky; it gathered on the shovel and Jim struck the shovel on the end of a tie to knock off the snow. He had only just put the shovel back onto the rail when he fell off." Did you
55 make that statement?

A. I believe I did say that. It was not correct. I don't remember whether my brother Jimmy struck the tie to knock the snow off the shovel just before he fell off. It was quite a piece on the other side of the bridge that I noticed him raise the shovel. I don't know as it struck the tie or not or dropped down on the rail. He kind of raised it up and set it down on the rail. I wouldn't swear whether he hit the tie with the shovel, or the rail. I don't know as he raised it up to get the snow off the shovel or not, or

whether his shovel was balanced off the rail; that he took it and raised it to put it upon the rail or not, but I seen him raise the shovel up.

Q. On the occasion I have referred to did you make this statement: "Six men on a hand car have plenty of room. We often have had 8 and 10 men on a hand car of the same size?"

Objected to by plaintiff; objection sustained; exception by defendant.

Q. Did you, on the occasion I have referred to, at Harper's Ferry, say as follows: "I am a larger man than Jim ever was, and my legs are a great deal longer. I have never had any trouble in keeping my feet up when I sat on the front of the car?"

56 Objected to by plaintiff; objection sustained; exception by defendant.

Q. On the occasion referred to did you state as follows: "If a man is holding a shovel on the rail and he is sitting on the front of a hand car there is no way for him to get hurt unless he forgets himself and lets his feet drop down?"

Objected to by plaintiff; objection sustained; exception by defendant.

Q. On the occasion referred to did you state: "The hand car was in good condition, nothing broken about it in any way. It was an ordinary car, full size?"

Objected to by plaintiff; objection sustained; exception by defendant.

Q. Did you, on the occasion referred to, state as follows: "I am foreman at present on section No. 20. The top of the ribbons on the ties of the cattle-guard was about level with the ball of the rail?"

A. Well, sir, I don't remember whether I did or not say that.

Q. If you did say that was it the truth or not?

Objected to by plaintiff; objection sustained; exception by defendant.

Q. Did you, on the occasion referred to, state as follows: "It is customary for section men to do just what Jim was doing at
57 the time he got hurt?

A. Well, sir, I believe I did say that. It was not true. I said lots of things; just tried to get rid of the man. He says, "I want you to just tell me how your brother got hurted, and tell me the truth how it happened." The first thing I told him he contradicted me. I have seen brooms on hand cars on sections 19, 20, and 21 of the Dubuque Division of the Milwaukee road; put on temporarily by the section foreman; taken off in the spring. We had had brooms on the hand car my brother fell from before that winter. Sometimes we would be running ahead of a train and the train would come close to us and maybe have to take the car off in

a hurry, and just taking off one end of it, lifting it up behind, we would maybe break one handle off the broom—break it off so short we couldn't use it. I don't know what time we took the brooms off the hand car that spring, nor how long before Jimmy was hurt. I don't know whether they were left off because the winter was supposed to be over and it was supposed there was no further use for them or not. I don't know how many days before this 5 of March I saw these brooms on that car. It might have been
58 two or three weeks, maybe. I don't know whether we took them off or they broke off. I don't know one of them was broke off. I don't remember whether I assisted in taking them off or not. I helped to take them off sometimes and put them on. I don't know whether I had anything to do with taking them off or not that spring. These brooms I have referred to were old brooms; worn pretty well down. They pick them up and put them on. I don't know what threw the shovel out of Kennedy's hand.

Re-examined:

This Mr. Buel is road-master on the Milwaukee road. Mr. Harriman is claim agent. Mr. Buel and him was up there once, and Mr. Herriman was there twice.

Cross-examined:

Q. I have asked you about a statement of the 23d of March, 1886, signed by you at Harper's Ferry. I want to know whether of September 1st, 1886, you signed another statement at Harper's Ferry in regard to this matter. Is that your signature?

Witness shown paper hereto attached marked Exhibit B.

A. Yes, sir.

Q. Did you state, "I remember that we started and ran about half a mile, when we stopped the hand car. It was then that the foreman said, 'Two of you get shovels and hold them on the rails, or we won't get home to-night?'"

59 A. I don't remember anything about that. I remember of seeing Mr. Harriman up there twice; I don't remember the dates. The making of the two statements was some apart. I don't know how long they were apart. I don't remember whether I said at Harper's Ferry, on the occasion referred to, "Kennedy had two shovels; one of the other men took one of the shovels, when Jim said, 'I will hold one of them,' and took the shovel from him." That is my writing to that statement. I believe I said something like this to him, "We were not running over 4 or 5 miles per hour at the time of the accident." It was not the truth.

Q. Did you, on the occasion referred to, on September 1, 1886, in the presence of Buel and Herriman, at Harper's Ferry, state as follows: "I remember distinctly of the foreman cautioning the men to keep their feet up and to be careful?"

Objected to by plaintiff; objected sustained; exception by defendant.

Q. On the the 1st of September, 1886, at Harper's Ferry, in the presence of Mr. Buel and Mr. Herriman, did you make the following statement: "I was watching Kennedy, because I was afraid he would get hurt, as I didn't think he had ever held the shovel before?"

60 Objected to by plaintiff; objection sustained; exception by defendant.

Re-examined:

Did you ever see Mr. Herriman, after your brother was hurt up to the time of the trial here, that he didn't want you to make some kind of a statement on this subject?

Objected to by defendant as incompetent, immaterial, and irrelevant; objection overruled; exception by defendant.

A. No, sir. I seen him and talked with him. He told me that he offered Jimmy so and so, such an amount of money. I never wrote down any statement myself. I can't write nothing, only my own name. Herriman done the writing. He would write down and tell me something himself, and then he would say, "Well, I don't care about that, I just want to know the outside of it, just to get the outside of it." Herriman didn't put down all I told him; I believe he had O'Brien put down some of it. He put down some that I told him, and some more he didn't put down. I didn't say all that counsel has read over here. I didn't swear to this before anybody. Mr. Buel wasn't present both times. In September, when Herriman was there, I had just come in from my work, and he followed me out and called me back. He
61 says, "I want to see you a minute;" called me into the office. He said that he wanted to settle with Jimmy, and that ye fellows wouldn't settle with him, and he offered him $2,500, and that he would settle with him, and now he won't get nothing. He gave no reason why he wanted the second statement after I signed the first; only he said he just wanted to get the outside of the matter. Mr. Buel took part in the conversation; he asked me how fast the car was running; the first thing I told him "between 7 and 8 miles an hour." Instead of putting down between 7 and 8 miles an hour they put down between 4 and 5. I don't remember of anything else which differed but that, that I now recollect that Mr. Knight has asked me about. I was a witness on the trial before. I guess this gentleman took down my testimony just as he is doing it now. They showed me all these statements at that time.

Thereupon the plaintiff calls Dr. WAPLES, who, being duly sworn, testified as follows:

I am a physician and surgeon, living in Dubuque. I have been in practice 20 years. I have seen James Artery; the first time I saw him was in November, 1886, at Mercy Hospital, in this city.
62 I went up to examine him. I think it was the 25th of November, 1886. I found him suffering from the effect of a severe

injury of the spinal cord, and its coverings, of the spinal column of the backbone, causing him to present genuine appearances of profound debility and emaciation, with loss of power, both of motion and of sensation, in the lower extremities, from about the middle of the trunk down, which would leave a severe grade of disability—a disability that would probably require the attention of another party all his life, which is the highest grade of disability known to pension boards or where physical disabilities are rated. There is wasting of the muscles and a softening of the joints and contracting of the tendons and coverings of the joints which ultimately, in my opinion, will lead to perfect and complete stiffness of the joints of the lower extremities. The smaller joints and, I think, the ankle-joints show it now. There is more or less paralysis of the bladder and of the bowel—the lower bowel—so that it is questionable whether the man has any sensation when he wants to defecate or have a passage or to have water pass. There must be times when he is utterly unconscious of anything of the kind, except from finding the
63 presence of it staining his clothes. Then the powers of nutrition, which are sustained by the functions of the spinal cord and are kept up—the nourishment of the tissues—by the paralysis will always be impaired, and I think the man is a helpless, hopeless, incurable cripple for life.

Thereupon the plaintiff called JOHN O'NEILL, who, being duly sworn, testified as follows:

I live about three miles west of Harper's Ferry now. I am a farmer. I worked on the Milwaukee railroad two years, off and on. I was a farmer before I went on the road. I know James Artery, and have for 25 or '6 years. We went to school together. Prior to the 5th of March, 1883, he was a stout, hearty young fellow, during my time of knowing him. I worked for the Milwaukee road a good deal, in the coal-shed first. After I left the coal-shed I started to work on that section when they took on some more hands, and I guess I worked until June of that same year Jimmy got hurted. I wasn't working only about 2 or 3 weeks before Jimmy got hurt. I don't know as I was that long. It seems to me I went to work the same time Jimmy did there. Before that I had worked on the section south of that, and then I worked some on that. I remember
64 the day that Jim got hurt. It was a somewhat cloudy day. It might have been nice in the forenoon when we went north to work, but it was a kind of cloudy afternoon, and it started to snow when, I should judge, we were about four miles and a half or so north of Harper's Ferry, and probably five. We worked, I guess, until a little after five; maybe fifteen or twenty minutes; maybe half past. Mr. Rellehan had a watch and a time-card. He came on that section the fall before Jimmy got hurted. Before Rellehan ordered the car put on the track he said we were on the train's time; to get her along if we could. He said the train must have been pretty close to us. He told us to put on the car first and put the tools on the car and start for home. We put on all the tools and we all got onto the platform of the car to pump the car and it

wouldn't run. The wheels would turn. Then he told us to get off, a couple of us, and push her, and see if we couldn't get her started and get a little headway up. Two of us got off, anyhow, and started to push and pushed her off pretty rapid for a little piece, running after her, and then we jumped on, at the same time kept pumping, and when we got about two or three rods, I guess, it stopped again, and
64½ he told us that wouldn't ever do; we would have to get her to town someway, and I don't know whether he pointed to Jemmy Artery or not, but he said for two men to get shovels: "Two of you men get shovels and set on the front of the car and knock the snow off the rail." I was around on the hind end of the car, closest to that part of it where the shovels used to be put on, and I picked up two shovels; I gave one to Kennedy, and Artery, I think, got the other one; but I don't know whether Rellehan told him or not. I wasn't watching that part of it. Kennedy and Arterry placed themselves on the front of the hand car. We started up then, and he told us to give her the gun and try and get down over the track, and so we went on at a pretty rapid rate. After we got the snow off the car run just as rapidly as though it wasn't on at all. We pumped, I know, as fast as we could, or as hard, and we had a kind of down grade. We probably might have went a mile or a little more, and Kennedy's shovel was snapped out of his hand. Then the car was stopped and Kennedy got off and got his shovel, & while we were stopped we listened for the train, of course; it wasn't a second though; and then he told us to get on and start her up again, and we did until we came down to the bridge; that was about
65 200 feet long, I guess, and the snow hadn't stayed on the rail much there. It was in the mouth of the hollow like, and the wind, more or less, went down that hollow and took the snow off the rail more than it did on the other part of the road. So we got up a pretty good steam going over that bridge; it was a little down grade. There was a culvert about 200—maybe 300—feet from the bridge, a cattle-guard and crossing. Something or other struck there. I couldn't see; my head was up and down all the time, and I couldn't keep my eye on any one thing stationary, but at times I could see Jimmy sitting there; whether holding it all the time there I couldn't say, but I know the shovel was snapped, and Jimmy was snapped too. He whipped right under the car when we got to the culvert. At that time I should judge we were going 7 or 7½, maybe 8, miles an hour. I thought it was a faster gait than we could go, for there was snow on a good deal. When he was throwed off the car he was doubled right under the car, and the car run right upon him so bad that after we had all jumped off, the car started to run back, and the car was off the track—one wheel on the inside of the rail and one outside of the track altogether. We tried to pull him out and we couldn't. He was
66 wedged right between the brake beam and the platform of the car. Jimmy's brother got the spike maul and broke the brake off in two or three pieces. After that Jimmy's foot snapped right out, just as though it was rubber, it was crushed in there so tight; so we pulled the car off the track then, and carried Jimmy

out and laid him right on our coats, on the ground there. Well, we just got off the car in time, before that freight train came by us. Before we had it off we could see her coming around the curve. The curve was probably half a mile from where we were—no further, because we couldn't see any further than there. Rellehan sent John Kennedy up with a flag. He just got probably half ways to that bridge and he called him back and told him it was no use, the train had got too close to stop her anywhere near where he was; so Kennedy came back, and about the time Kennedy got back the train was just within a few rods of us. After she went by we put Jim on the hand car and pushed it into Harper's Ferry. We carried him from the railroad depot to my house on a grain door. He stayed there, I guess, 5 or 6 weeks. After Jimmy fell off I think
67 the car went 20 or 30 feet, anyhow. After he was taken to my house he suffered a good deal, terrible pain there, I know. We never could sleep hardly in the house. He annoyed all that was there with his pain or the way he felt; required constant care and attention. I don't know the usual speed at which the hand car run. Sometimes we could make it run faster than others. It could run 6 and 10 miles. The usual and ordinary rate of speed at which we run it up and down the road was about 7 or 8 miles. I was acquainted with the culverts and the way the ribbons were put on the ties. I think the ribbons were about three inches and a half, or maybe more, from the rails on either side.

Q. An ordinary shovel that you used laid on the rail could touch the ends of the ribbons, couldn't it?

A. Well, I think it could if it was not—if it could be held there stationery that it wouldn't move either one way or the other. I believe it could be held on the rail and at the same time come far enough in to catch onto the ribbons. I think the ribbons were about three and a half or four inches high. I don't know whether the ribbon came up even with the top of the rail or above or below. It
68 used to look to me that it was higher when I would be on the track. It may not have been any higher, though I couldn't say; I never measured. There was no place on this car upon which a man engaged as Jimmy Artery was engaged could rest his feet. He had to hold them up by muscular exertion. I have seen hand cars with brooms on them on that section. I have seen them on and seen the cars used with them on lots of times. I am not in the employ of the company now; haven't been since the June after this accident.

Cross-examined:

When we started we run probably about 200 feet just around a curve. It wouldn't go any further on account of the snow. It was necessary to remove the snow before we could go any further. That is just the way they had the men put on there then. After the men took their seats on the front part of the car and held their shovels probably it run a mile. When we stopped the first time we stopped to get the snow off. After the men took their seats in the car the next stop we made Kennedy's shovel was thrown off. That is the

first one I remember of after the men had taken their seats on the car. They were all on the car and moved it with the levers
69 two or three hundred feet in that way. Then the car stopped. Then he put two men on the front of the car with shovels. Then we started up and run about a mile, when Kennedy's shovel was taken out of his hands. It was whipped off the rail some shape or other. I don't know how it was. I don't recollect just now testifying on the last trial that after the two men took their seats on the hand car with shovels that we run a certain distance and then stopped at a curve to listen to the train that was coming after. I probably forgot some things that I didn't think of before or state before. I don't know whether my recollection was better at the last trial than it is at this or not. Probably it was as good, probably it wasn't. I didn't say that we stopped to listen for the train that was following us before the two men took their seats on the front of the car. I said the car stopped, and we, of course, was listening then. The two men was getting ready for the front end of the car, and we listened, of course, while they were getting them shovels. I don't know as anybody said anything about listening for the coming train; but of course a man would naturally listen himself. The boss said it was train time. The next stop, being the first after the
70 men sat on the front of the car, was after Kennedy's shovel was taken out of his hand. I don't know whether I testified on the last trial that after the men had sat upon the car with shovels that we went onto a curve and listened for the coming train, and then started up again and ran quite a ways, a mile or a little more, when Kennedy's shovel caught between the rails and it was whipped right from him 7 or 8 feet from the track. I didn't see Kennedy's shovel catch in any rail or between any rail. After the men took their seats with shovels I don't remember we stopped any time until that shovel business came in back there somewhere. After Kennedy's shovel was knocked out of his hand the next stop was when Jimmy Artery was knocked off, as I remember. I don't remember testifying at the last trial that after we stopped to listen at the curve in the first place and after Kennedy's shovel was thrown out of his hand that we stopped again before Artery was thrown from the hand car. I suppose I have given in evidence that we stopped when Kennedy's shovel came off. I don't remember stopping any other time. From the time the car started till Artery fell off the hand car two stops is all I remember of. I don't know what time the
71 tools were put on the car and the first start was made. I didn't have any watch. I heard Rellehan saying it was pretty near train time. I don't remember hearing anybody say how near train time it was. After Artery fell off we endeavored to lift the car from him. Then the brake-rod was broken and he was taken out. I couldn't tell the reason why the train wasn't stopped. I wasn't bossing that. Rellehan proposed it. I don't know what he proposed it for. He didn't say anything about it any further. They might have made the assertion when Rellehan thought about stopping the train that it wasn't much use and it was better to put him on the car, he was hurt so bad. As the car came along the road I

didn't have my eye on James Artery all the time. Sometimes I did. I couldn't all the time. My head would go down, and of course my eyes wouldn't be on him, but when I come up I would get them on him a while. I believe I can read writing.

Witness was shown paper, hereto attached, marked "Exhibit C." I believe that is my signature. I done that to get rid of him. He was bothering me. I wasn't in his employ. I was on my
72 own business. He came around bothering me, and I signed that and let him go. This statement was taken on my farm. One was taken in my house; the other, I was threshing at a neighbor's. The one shown me was taken in my house, I guess, in the month of April. I was under no obligation to them at all. I didn't furnish the writing material to make the statement. I don't recollect the time it was made; after dinner some time. I was in the house when he came in. I guess I remained with him when the statement was being written. I didn't write part of it. Mr. Herriman wrote it. My wife and a cousin of her's was there. I don't remember of furnishing him anything. He was there with me at that time probably twenty minutes or more. I did not state to Mr. Herriman in my house the 1st of April, 1886, "At the time of the accident we were not running to exceed three miles an hour." He asked me what time I thought it was running, and I didn't say anything. I sat down and was thinking, and he says, "Now, don't you think it was running between 2 and 3 and 4 miles an hour—something like that?" I says, "I don't know." Well, he says, can't you recollect something about it? I told him I didn't know whether I could or not. I might get pretty close to it, and
73 maybe I wouldn't, and he says, "To the best of your knowl-e-ge, what do you think, anyhow, about it?" I says, "I don't know. I can't tell much about hand-car time. I ain't ever had much experience to run on a hand car, and don't know how fast they might go." "Well," he says, "you better let me put it in for something." Well, he put it in at 3 or 4 miles. I don't know just which, though. I didn't read this statement after him, and I don't know what he did. He asked me some things and I asked him if he put them down. He says, "Oh, it don't make any difference whether I did or not, that part of it. We don't want only to just get at the bottom of the thing"—something like that. I told him I didn't know much about the time of hand cars to get rid of him. I have said I believe I took the shovels, and I gave one to Kennedy and one to Artery.

Q. Did you state to Herriman on this occasion, after Rellehan had said, "You men take shovels—two of you take shovels—and sit on the front of the car," as follows: "I was the quickest, and got a shovel from Kennedy, who had them, when Jim Artery came and took the shovel from me and went and sat on the car?"

A. No; I don't think I stated it that way. I took the
74 shovels. I agree to that, but I handed it to Kennedy and one to Jimmy. He didn't take it off me; didn't try to.

Q. Did you tell Mr. Herriman on that occasion, "He (Artery) was not told to take the shovel any more than the rest of us. Had he

not taken the shovel from me I would have set on the car instead of him?"

A. I told him I didn't hear him mention any name, but he might have pointed to him and I didn't know. I don't remember telling Herriman on this occasion, on April 1st, 1886, when I signed this statement, that we had stopped once or twice before Artery fell off to shovel off the track.

Q. Did you tell Herriman on that occasion, as appears in this statement, that it was customary for some of the men to sit on the car in the winter when it was necessary to throw off the snow?

Objected to by plaintiff; objection sustained; exception by defendant.

Re-examined:

I should judge it was 2½ or 3 miles from the place where Artery was hurt down to Harper's Ferry.

Q. How did you get the car down?

Objected to by defendant; objection overruled; exception by defendant.

75 A. We shoved it along with shovels.

Q. Well, with the running gear broke, you were able to push it down, were you?

Objected to by def't as incompetent, irrelevant, and immaterial; objection overruled; exception by defen't.

Recross-examined:

The brake that belonged to the car is all that he broke with the maul. We could pump the car with Artery on it, but the boss wouldn't let us pump it. He said it would hurt him too bad.

Thereupon the plaintiff called Dr. GREEN, who, being duly sworn, testified as follows:

I am a physician and surgeon; live in Dubuque; have practiced here since 1875. I have seen James Artery; I think it was some time last fall, at Mercy Hospital. He had the signs of an injury at the junction of the back of the loin portion of the spinal column, and he had paralysis of all parts below that. His muscles were wasted away, so that there was but little more than skin and bone. He was very much emaciated generally, very pale and anæmis. I should say that it was very highly improbable that he
76 would ever improve. I think he had no motion or use of his limbs at all, or feeling.

Thereupon the plaintiff called LAURENCE RICE, who, being duly sworn, testified as follows:

I live at Mercy Hospital, at Dubuque. I know when James Artery came there. Since he has been there he has required constant attention day and night. He is not able to take care of himself. He is not a bit better or worse than he was when he came there.

Thereupon counsel for plaintiff read from the deposition of JAMES RELLEHAN as follows:

The men I have named as being in my employ, in my gang, when doing work on that section with me were under my orders. If they did not obey my orders I would dismiss them from the company's service.

Thereupon, by consent, plaintiff's counsel offered tables showing expectancy of life: That at 26 years of age the natural expectancy of life is 35 years and $\frac{44}{100}$; at 30 years of age it is 32 years and $\frac{76}{100}$.

Thereupon the plaintiff rested his case.

Thereupon the defendant, to support the issues on its side,
77 read the testimony of JOHN KENNEDY, who testified as follows:

I live at Emmetsburg, Palo Alto county, Iowa. I am farming. I was once in the employ of the Chicago, Milwaukee & St. Paul Railroad Company. I left the employ of the company in March, 1883, prior to which time I was in the employ of the company about two years, laying track and general section work. March 5th we were ditching on section 20, running north from Harper's Ferry, with Rellehan. I remember going north with Artery and the section men from Harper's Ferry that day on the hand car 4 or 5 miles. I remember starting to return in the evening when we were through work. It had been snowing, and I believe it was snowing still. It commenced, I think, between 2 and 3 o'clock. It seemed to be soft snow. We got our hand car on the track, picked up our tools and put them on, and I believe we all jumped on the car and tried to pump it, and it seemed we couldn't. I think somebody got off and shoved her a piece. I think we went a short distance and we found we could not make very good headway, and we got
our shovels and held them on the rail to shove the snow
78 off until the time we got up to where Artery got hurt. Artery and I held the shovels, I sitting on one side of the front of the car and he on the other. Before we got the shovels I am not certain what Rellehan said, but I think he said "You boys" or "men, some of you, get a shovel and shove the snow off the rail." I suppose Artery was on the car at that time. I think John O'Neill got down and got a shovel, and Mr. Artery said he would take it, and did, and sat down on the front of the car. I don't remember Rellehan saying anything more than what I have detailed. I don't remember that he said anything as to how we should hold the shovels or how we should set. I couldn't say whether it was hard to run the car, as I was not pumping, but suppose it was kind of hard. Just before and at the time Artery fell under the car I should judge the car was running 5 miles an hour. While sitting on the front of the car I don't remember Rellehan making any remarks to us, or the men that were pumping the car did not hear anything said. After the plaintiff fell under the car Rellehan sent me back to flag a train. I went back 6 or 7

79 rods and Mr. Rellehan called me back. After the train passed we put our hand car on, stretched James Artery on the car, and pushed for home. I couldn't tell how long the hand car from which he fell had been on the section before the accident. I should judge it was on 2 or 3 months. It was a standard car—the usual car. I think the brake and car were all in good condition. There had never been any foot-rest on this car. There may have been an appliance for holding brooms, but I don't remember. While I was working on the section with the car I could not say there was. I don't remember of any ever having been on the car. I never saw any hand cars furnished to the men from the shop having any appliance on for pushing the snow from the track in front of the wheel. We have several times sat on the front of the car and held shovels to push the snow off the rails. I could not say whether it was customary and usual or not, but we have done it several times on that section. I have done it a few times before this time and seen other men do it. While holding the shovel in front of the car I do not remember anything about the snow flying back in my face as the car was propelled forward. I don't
80 think it was. It was a mild afternoon. If the snow was not cleaned off the track we would have to walk and shove the hand car back. There was some water in the ditches that afternoon—some slush or mud. I should judge this train passed about 5 or 10 minutes after the accident. I knew this section pretty well while I worked on it—about the cattle-guards, crossings, and so forth. The cattle-guards were all right. I think the angular pieces on the ties were up with the ball or even with the top of the rail.

Cross-examined:

I have been engaged in railroading before the two years that I lived at Harper's Ferry. I worked on what they call the Waukon narrow gauge; have been farming since I left Harper's Ferry, in March, 1883. I quit work probably a week after Artery got hurt. We had another hand car before the one that we were on at the time the accident happened. I have seen and known of brooms being put on that hand car to take off the snow whenever there was any occasion of light snow. It would sweep off a light snow well enough for the car to run along. It commenced to snow between 2 & 3 o'clock; snowed quite considerable for a while, came down pretty heavy—a soft snow. I don't remember that
81 my shovel fell off. I don't remember of the car stopping before Artery was hurt. I don't recollect that my shovel was thrown out of my hand and we had to stop to get it up again. I don't remember whether or not the car stopped between the time we started with the shovels and the time that Artery was hurt. At the time Artery was hurt the hand car was going at least 5 miles an hour. I don't know how far the car went after Jimmy fell off before it was stopped. It seemed to me it was stopped pretty sudden after he fell off. I never took particular occasion to examine and understand the height of the ribbons as compared to the top of

the rail. What I say about it is the recollection that I now have of the general appearance.

Re-examined:

I thought I said the car was running about 5 miles an hour at the time Mr. Artery fell off the car.

Thereupon the defendant read the testimony — ANTHONY DONALAN, who testified as follows:

I reside at Montrose, Dakota; am engaged in farming. I was employed by the Milwaukee Company at one time, doing section work on the Dubuque Division, on the section running 6 or
82 7 miles north of Harper's Ferry. I worked at different times 3 or 4 months every summer probably for 2 or 3 years. I was at work on the section running north from Harper's Ferry on March 5, 1883, as one of the section hands. I remember the accident to the plaintiff Artery. We were 4 or 5 miles north of Harper's Ferry when we started to return in the evening. Prior to the 5th of March, 1883, I had been working on the section about 2 weeks. Before we started to return home that evening, and just before Artery and Kennedy took the shovels and sat down in front of the car, Rellehan said that this would never do: "Some of the men take shovels and run the snow off the rails." We wer-n't making much progress with the hand car at that time. The snow was a soft snow, I think—wet kind of a snow. At the time and just before Artery fell off the car the speed of the hand car, I thought, was 4 or 5 miles an hour.

Cross-examined:

I was pumping that day. I suppose at a pretty good rate. I don't remember exactly.

Re-examined:

I didn't know exactly what the speed of the hand car was
83 at that time. I had my idea—my judgment, that was 4 or 5 miles an hour.

Recross-examined:

I couldn't say when my attention was first called after the accident to how fast that car was running. I do not know as I ever thought of it. I would not claim but what it was a long time after.

Thereupon the defendant read the deposition of PATRICK RELLEHAN, who testified as follows:

I reside at Noviene, Idaho, Bear Lake county; have been employed for 2 years past as foreman for Union Pacific Company; was in the employ of the defendant company during the fall of 1882 and the winter and spring of 1883; left its service about the first of March, 1884; have not been in its employ since. During the winter of 1882 and winter and spring of 1883 I was section fore-

man on the Dubuque Division of the company's road, section number 20, Harper's Ferry section, running north; was section foreman of that section on the 5th day of March, 1883. John Kennedy, Jerry Artery, Pat. Donalan, John O'Neill, James Artery, and myself constituted the section gang. We lived at Harper's
84 Ferry at this time. Between six and seven miles were included in my section. On the 5th day of March I went with my men, I should judge, between 4 or 5 miles north of Harper's Ferry. We went over our section three or four times a week, more or less. James Artery was on the section when I took charge of it, about October, 1882. I got orders to reduce my force about the last of October or the first of November, and he left and was off the section until, I think, some time in February. He worked some in January, shoveling the snow, from 2 and a half to 3 days; can't say that he worked any in February. He worked four and a half days in March, 1883, ditching and doing any other track-work on all parts of the section. During the fall of 1882 he had worked raising and fixing up track, not any one exact place, but all over the section. Me and my men were supposed to keep cattle-guards and fences in repair. The plaintiff was injured on the 5th day of March, 1883, between 5 and 6 o'clock in the afternoon. Just before the injury we had started from between 4 and 5 miles north of Harper's Ferry. From the place where we first started to the place where the accident occurred was, I should judge, between 2
85 & 3 miles. Just before the time we started for Harper's Ferry there was some light snow on the rails. John Kennedy and John O'Neill took 2 shovels, one apiece, to sit on front of hand car to keep the snow off the rails. James Artery, I think, spoke to O'Neill and said he would take the shovel to keep the snow off the rail. I cautioned those men before the car was started to be very careful and keep their feet off the ground. They made some kind of an answer that they would look out for that. I think James Artery sat in front on the river side and John Kennedy on the front of the car on the land side. I stood on the front of the car between these two men; would not say as to the position of the other three men, only they were pumping the car. At the time the car started until the accident to Artery occurred Artery and Kennedy were holding a shovel, each one, to keep the light snow off the rails so as to aid the hand car in running to get home. I can't say exactly how they were holding their legs. At the time of the accident and just prior thereto I should judge the speed of the hand car was from 4 to 5 miles an hour, more or less—that is, they may be running
86 a very little more than 4, not quite 5, and maybe a little more than 5. From the time we started until the accident occurred we had been running at between 4 and 5 miles an hour, I should judge. This was not the usual and customary speed for a hand car on my section. When we had a good rail and no snow to bother we would run faster. I could not say what caused the accident to the plaintiff Artery. I seen him drop off the car and the car run on top of him. When I seen him drop off the car I hollered to some of the men to put on the brakes. The car was stopped

about on top of him. It did not run over him. I went to pick one end of the car up and called to the men to lift the car straight off the man, which was done. The plaintiff Artery did not tell me how he came to fall off the car, but he said to other parties and to me that if he had done as I told him he would not got hurt. At this time we were using a good car—as good as the average—good size, standard gauge. I have carried as many as 8 and 10 men on this car. I used it from the time I took charge of the section. While
87 running over the track with the hand car if a foreman sees any of the cattle-guards or fences out of order he stops his hand car and gives orders to his men to repair any break that may be in the same.

Cross-examined:

The plaintiff was a good man to do his work. He suited me all right. The men I have named were under my orders when doing work on the section with me. If they did not obey my orders I would dismiss them from the company's service. From the place where we started to return to Harper's Ferry I would call the distance between 4 & 5 miles. We started to return between 5 and 6 o'clock. Some light snow had fallen before we started; whether it was snowing after we started I cannot say. I couldn't say what time of day it commenced snowing. I could not say as to the number of inches of snow that fell that day, but enough fell so that the car would not run without cleaning the snow off of the rails. I rather think the men were ditching that day. It had been thawing and the bank sloughing down. I had 5 men after placing the hand car on the track; three of them were pumping and 2 of them were keeping the snow
88 off the track with the shovels. We had to keep the snow off the track or the car would not run. I don't think we tried to make it run before getting the shovels. I could not say whether the five men took hold of the levers after putting the car on the track or not. The wheels of the hand car when there is snow on the track will spin and not go ahead to make any headway. I could not say that there was an attempt made to run the car before the men took the shovels. I will not swear that the men did not attempt to run the car before taking the shovels. I don't remember of making any such remark as "Boys, this will never do; we can't get home in this way," and then turning to Kennedy and the plaintiff saying "You boys get some shovels." If I had made any remark like that I don't think I would mention any names. I would not say but I made some remark, but not expressing in that way, in regard to telling Kennedy and Artery to take shovels, because I don't think I made mention of any names. I don't think I mentioned Artery's name or Kennedy's any more than the rest of the men. I did not place the men; they placed themselves. I
89 would not say that we stopped the car until Artery fell off. I would not swear we did not — the car on the road before Artery fell off. There was a train came along after Artery got injured. I don't see that I had to make vey great haste for to get the car clear of the track, as I had time enough to send a man

back with the intention to flag the train for to take James Artery in the train to Harper's Ferry, but both me and the men changed our minds and called the flagman back; thought it would be easier on the injured man to stretch him on his length on the hand car than to load him on the end door of the caboose of the coming train. It was some days afterwards that James Artery made the remark that if he had done as I said he would not have been hurt. I could not say as to the names of the parties present when he made them, because there were several people back and forth to the house where the sick man was. I would not say as to the number of days after he was hurt. There was nothing more on this hand car than any other hand car to hold up the feet of Kennedy and Artery as they held the shovels. I never heard nor seen any appliance put on
hand cars for to hold men's feet off the ground while sitting
90 down on hand car. There was none on the hand car in
question. There was no appliance on the hand car in question to push the snow off the rails. Artery fell off the car between 5 & 6 o'clock in the evening. I may have helped pump from the time we started till the plaintiff was injured, enough to balance myself from not falling off. The hand car was under my control after starting from Harper's Ferry and at the time plaintiff was injured. The plaintiff was employed as section man and in all kinds of work keeping the road, cattle guards, fences, and highway crossings in condition and including the track.

Re-examined:

After he was injured plaintiff was taken to John O'Neill's house. I visited him there and sat up nights with him. It was at these times that Artery stated to me that if he had done as I had told him he would not have been injured. I think he more than once stated this to me. I think this freight train I have testified about was an extra train. Artery was working on the section when I went there to work.
I should think he understood his duties and the running of
91 hand cars. While Artery was on the section while I was in
charge of it it was the custom with the men and me both that I and one of the men had sat in front of hand car previous to this time and kept snow off the rails with shovels so that the hand car would run. Just before the time we started for Harper's Ferry I may have said something to the men in regard to keeping the snow off the rails with shovels. I may have said to the men, "Boys, take some shovels and keep the snow off the rails so that we can get home. I don't remember the number of the hand car that was used at and prior to the time of the accident. There were ribbons on the cattle-guards on my section while I had charge. These ribbons were there when I took charge of the section. There had been no change in them during the time I had charge of the section and up to the time of the accident.

Thereupon the witness, JERRY ARTERY, was recalled by consent for further cross-examination by defendant:

92 The shovel my brother was holding was an ordinary track

shovel furnished to the men to work on the track. The hand car was the Milwaukee standard hand car. The car couldn't run unless both rails were cleaned off.

Thereupon the defendant called JOHN CAMERON, who, being duly sworn, testified as follows:

I am a bridge-builder in the employ of the Milwaukee & St. Paul road. My business is bridge building. I build new bridges and repair old ones. Cattle-guards are included in with the bridges. I have heard witnesses talk about ribbons on the cattle-guards on section 20, where Artery fell from the hand car. I am acquainted with the ribbons that are put upon the ends of cattle-guards. I frame those and get them ready for putting on. I have a drawing that guides me in framing the ribbons. I have it with me.

Witness thereupon produced blue print from draft of cattle-guards, which was exhibited to the jury, hereto attached, marked Exhibit D.

This is furnished to me from Milwaukee by the Milwaukee Company to build cattle-guards according to drawings. The
93 cattle-guards are built according to that design. I suppose I furnished the ribbons for the cattle-guards where Artery fell from the hand car. I furnish them all on this division. No one furnishes them to me—not on this division. The ribbons that were furnished corresponded to the drawing that appears here. I think this drawing is a quarter to the foot. The height of the ribbons, according to the standard, is four inches from the bottom to the top of the point of the ribbon. The height of the rail is four inches and a quarter. The ribbons rest on the same surface the rail does—on the face of the tie. The end of the ribbon is beveled. The distance from the point of the ribbon to the ball of the rail is four inches and a quarter. The bottom of the ribbon comes to the flange of the rail. It is cut back three inches on the block—on the ribbon, as it is called.

Blue print marked "Exhibit D" offered and received in evidence by defendant.

Cross-examined:

My men cut these ribbons out of 6 by 6. They split them once. They calculate a 6 by 6 split once makes a three-cornered piece four inches. If there is any more it is dressed down to four
94 inches. That is done in the shop by an adze and a plane. We run the gauge over and cut a regular line all the way along. I furnish the ribbons and let some one else put them on. The surface of ties is somewhat irregular on dumps or ground-work or anything of that kind. These ribbons are cut so as to come flush with the flange of the rail. They are beveled back, and that leaves the end of the top of the ribbon three inches from the lower end of the ribbon itself and within four inches and a quarter of the ball of the rail. The width of an ordinary railroad shovel is 10 inches.

Q. Then, if the distance between the end of the ribbon and the

ball of the rail is four inches and a quarter, a ten-inch shovel would reach over the rail and over the end of the ribbon, wouldn't it?

A. I should think ten inches would. These ribbons are made of pine. They are not liable to warp if they are spiked in properly. Spikes don't get loose very often. I suppose rails will sink to some extent into the ties after running years on them. I don't belong to that business.

Re-examined:

Those ties under these ribbons are made of oak; some-
95 times of oak and sometimes of pine. They are all sized down to a certain size. Whatever the smallest size lot will make they are all guaged and sized down to the same size, and they are laid on stringers on this cattle-guard. There is a stringer along with the rail made of 12 by 12 pine. That is sized down to a certain size. The ties are sized down. All the timber is sized. The ribbons are put across these ties. The end of the ribbon goes to the web or flange of the rail and then slopes back from that to this distance I have testified to.

Recross-examined:

I don't know as I have seen these ribbons chipped off or broke off at the top. I don't know as I ever saw them get loose. I have seen them taken off. I done the framing of this cattle-guard. I did not do the work of putting in the cattle-guard. I wasn't there when it was done. I have only personal knowledge of the framing of the cattle-guard, which was done at the shop.

Thereupon the defendant called DAVID WRIGHT, who, being duly sworn, testified as follows:

I reside in Red Wing, Minnesota. I am road-master on the
96 Chicago, Milwaukee & St. Paul Railway, from La Crosse to Saint Paul. My experience has been altogether in track-work about 30 years. I was for five years on a section. My duties as road-master are to see to the condition of the track and anything I would see that needed seeing to. I put in the cattle-guards. I see to their condition and safety. I have charge of the section men, tools, and hand cars, I have. I have been a road-master 30 years. I commenced with the Milwaukee road in June, 1872; have been with them ever since. I ought to know about the manner in which work is done on the section by section men. That is my business. I worked on the section as section man and section foreman. I have heard the testimony in this case about this accident to Mr. Artery and the manner in which it occurred, and about the snow being upon the track and their starting to return and the men taking shovels. I have in my experience known section men to be placed with shovels in front of the hand car as Mr. Artery was placed. I have seen men sit on each side of the hand car and hold a shovel on top of the rail and take the snow off when there was snow
97 on the rail. I have done it myself. The usual and ordinary

way of getting a hand car over the road, when there is snow on the rail and the car cannot be moved until the snow is taken off, is to sit on the side of the hand car and hold a shovel on the rail, and scrape the snow off the top of it so the hand car will run. Under these circumstances the other men would be working the hand car. I have seen that done among the section men hundreds of times. I have seen men put on brooms—the section men or the section foreman. That will give them the use of the two men that is holding the shovels. A light snow brooms would remove, but there are snows brooms won't remove. Then, in that case, such as the damp snow, you will have to have recourse to the shovels. By light snow I mean an ordinary light snow that one sees on the top of the rail. With the damp snow it wouldn't move so easy; it would stick; it wouldn't move at all; the broom would clog. In my experience the snow should be a dry, light snow. I never knew a railroad company to put on any appliance on the front of a hand car to move the snow. I know of no appliance being put upon the front of a hand car as a foot-rest for the use
98 of the section men and people in front to hold their feet. I have never known of anybody being injured by holding a shovel in front of a hand car to take snow off the rail while it was being propelled along the track. I know what is called the standard Milwaukee hand car. It is the duty of the section men to assist in moving the hand car from one end of the section to the other or wherever it may be needed on the section. The car is for the purpose of taking the trackmen over the section and carrying their tools. It is the duty of the foreman to bring the hand car to the hand-car house and deposit it there with the tools and lock it up for the night. It is not customary for them to leave the hand car along the section or any of the tools over night. It is never done, except when you can't do anything else. It is the imperitive duty of the foreman to get his car and tools home and get them in a safe place at the end of the day's work. Section men are liable to call at any time on the section, day or night. It is the duty of the section men to aid in getting the hand car back to the end of the section at night. In holding a shovel in front of the hand car
99 a man would be required to stoop forward. My division of the road does not take in the place where Artery was hurt. If there was somewhat damp snow on the rail, which necessitated a shovel to be used to move the hand car, a freight train passing over the track, if the snow still continued to fall after the freight train passed would make it worse, because there is, as railroad men know, what they call gumming. It leaves a kind of a gum on the top of the rail, and snow falling on that would make it harder to move. I know the Milwaukee standard hand car. I have made no measurement of the distance from the end of the car to where the lever plays up and down. The lever would not interfere with a man sitting on the front of a Milwaukee standard hand car if he placed himself in the right position. He could sit there without the lever touching him. He couldn't sit up straight and hold the shovel on

the rail; he would have to stoop forward, and, so stooping forward, the lever wouldn't touch him.

Cross-examined:

The running of a freight train ahead of a hand car will make it harder for the hand car to run along, if, during that time, the
100 snow continued to fall than if it had gone on before the freight train. The hand car couldn't move in either case without the shovels. I don't know what the effect of two trains going over ahead of the hand car would be. I know what the effect of one train would be from experience. I have had that experience on the river road. I had it last winter. I was on the hand car from Winona to Minnesota City; it was last January; I can't tell you the day; the snow was falling at the time. We took off our hand car to let the freight train pass, and as quickly as it had passed we put the hand car on and followed it. We had men with shovels, holding them, and we were able to propel the car slowly. I was holding a shovel part of the time. The handle of the car projects out from the body of the car and makes a very nice rest for your legs; you put your legs over that handle. I could ride six or ten miles that way; if necessity required, I could ride 20 miles. The shovel is three feet long. I have sat that way and rode ten miles or fifteen, and it didn't tire me very much, without stopping; maybe stopped to take off the hand car for a freight train and put it on
101 again. I never heard of Artery's being hurt, and I have been on this road nearly 15 years. My division has always been the same. I don't know how far the lower end of my section is from Harper's Ferry. I don't know where Harper's Ferry actually is. I never was over the Dubuque Division until day before yesterday. I never heard that a man was injured by reason of being thrown off a hand car on the Dubuque Division in March, 1883. Accidents might happen on the Milwaukee road dozens of times and I never hear anything about it, except on the division to which I am attached. I am not supposed to know anything about any other division, nor don't, nor care as little. I have seen brooms put on hand cars frequently. I am talking now about my own division or any other division I have been attached to. I have worked on the Pittsburgh, Ft. Wayne & Chicago railroad; held the same position that I hold here. I have seen brooms used on hand cars every winter; they were attached by a piece of iron fastened on the side of the car or by a piece of scantling nailed on the end of the car and a hole bored through it and the handles of the
102 brooms stuck up into it. That is an easy and simple way for moving a certain kind of snow. It is not as easy to run the hand car with the brooms on as it is with them off. It is cumbersome for putting on the tools. I don't know how this attachment could be placed under the surface. I have never seen it done that way. I don't think it would be as effective. I don't see any particular danger in either way of getting the snow off the track—by the use of brooms or by a man setting on the front of the car and holding a shovel. It would be as safe for me as sitting in a buggy and

riding behind a nice easy horse. I should suppose that it is as safe as anything else a section man is called upon to do.

Re-examined:

I have been asked whether this work of sitting on the front of a hand car and holding a shovel was not dangerous work and I have answered it.

Q. Is it not the fact that men prefer to do that rather than to pump the car?

Objected to as incompetent, irrelevant, and immaterial; objection sustained; exception by defendant.

103 The hand car that I rode on from Winona to Minnesota City was one of the Milwaukee standard hand cars. We got no other kind on the division. I started down the road in advance of a freight train; took the car off when we see it coming, and when the train passed put the car on. It was hard working the car along the track before the freight train passed and after; it was harder work after it than it was before. That is the reason that drew my attention to the thing and what made me know that it was harder work after the train passed than it was before.

Recross-examined:

This day I rode on the hand car it was snowing; it was a cold day—not so very cold. The snow was a kind of snow that gummed on the rail and stuck fast. I don't know how long it had been snowing before we started. It was snowing when I got up in the morning. There was three or four inches on the track, probably half an inch on the rail. No train had gone over after it commenced to snow for some time. In a fall of three or four inches of snow maybe half an inch would be on top of the rail and maybe not; maybe
104 some places more and some places less; wherever the wind would happen to strike it it would be less.

Thereupon the court, at the request of the defendant, directed the jury to proceed with the marshal to the outside of the court-house and view a hand car, which was exhibited to them and which defendant says was just like the car on which plaintiff was injured. The hand car was produced by and exhibited at the instance of the defendant. The jury fully examined the same.

Thereupon the defendant called CHARLES CARNEY, who, being duly sworn, testified as follows:

I live at Lamars, Iowa. I am road supervisor, Illinois Central railroad. I oversee the sections, track and track men, track material, safety of track, &c.; have been in this position since April, 1883. I have been section foreman from 1876 to that time on the Iowa Division of the Illinois Central; never was employed on any other railroad. I was section foreman and extra foreman about six years. I have ridden and worked on hand cars all my life pretty near; ever since I commenced railroading as a boy. I have

105 seen men placed to sit on the front of a hand car to hold shovels to take the snow off the track while the hand car was being propelled along the line. When the snow is on the rail if the car will not move unless the snow is removed the only way is to take it off by holding a shovel in front of the hand car or sitting down and holding your foot on the rail and shoving it off with your foot. That is the only way I know—the only way I ever saw. I could not say how often I have seen shovels used for the purpose of taking the snow off the rail when it was required. Catched out in a snow-storm and had to use a shovel to get home, why use it. I have sat down and held my foot on the rail—I have held a shovel and taken the snow off the rail—while the hand car was being propelled. I never knew of any man but this one being hurt while holding the shovel taking the snow off the rail while the hand car was on the track; never heard of anybody being hurt before. If a section crew got on the track and there was snow on the rail so that the car could not be moved by pumping and without removing the snow from the rail the usual and customary thing to do, in order that the car might be moved along the track, would be
106 to me a shovel or sometimes hold the foot to get the snow off the rail. It requires very little snow to impede the running of a hand car. If there was half an inch of snow that was damp and adhered to the rail you could not go at all without removing the snow, or very slowly, unless you shoved the hand car; it would not go by pumping it. I never saw hand cars in use by section men on railroads equipped with a foot rest in front of them. I never saw a broom in front of a hand car in any shape; never heard tell of it until to-day. It is the duty of the section force to get the hand car home at night after the work is done. If a freight train passed over the track with half an inch of damp snow on the rail and the snow still continued to fall it would make it a great deal worse for the hand-car men to get the car over the track just a few minutes after the train would go by. The snow when the train would run over it would get all wet up—gummy—like oil almost. The snow that would collect on the whole trip of the train—a mile or two, or three miles—kind of water on the wheels would stick along and make it gummy, and snow falling on that would make it
107 very sticky, and the shovel would only get out very little of it; couldn't get it out; more gum than snow. The condition of affairs would be worse after the passage of a freight train ahead of a hand car, the snow continuing to fall and there having been a half inch of such snow on the track before. The section foreman and section crew don't wait for trains to come along. If it is time to go, they go home, or go where they intend to go. It is not customary to wait for trains when they get ready to start—not in my experience.

Cross-examined:

I have had no experience in railroading anywhere except on the Illinois Central, from Cairo to Sioux City. I commenced on the Illinois Central when I was about eleven years old, at Dixon, Ills.,

and have travelled north & south of that ever since. The section men are under exclusive control and protection of the section boss during the time they are out on the road. I have sometimes held my foot out & sometimes used a shovel. I could not say how fast the car was going when I held my foot out. I can hold it at
108 any speed—about eight miles an hour or ten. It would be safe for me to do that; I would consider it safe; I don't know about anybody else. I think the shovel is a little the safest. If I did not have the shovel I would not have any hesitancy about putting my foot out. I should consider it a safe and prudent thing to do when the car was going at the rate of eight miles an hour. I don't know as I ever ordered a man to hold his foot out when I did not happen to have a shovel. I don't know whether I ever saw any other man besides myself on a hand car hold his foot out to brush the snow off the track. I don't know whether the man opposite to me had a shovel or his foot out. I would not have to stoop over very much to avoid the handle. I think our cars are higher than the Milwaukee car. The platform can't be larger; not wider. You can have it longer if you want to. I think on our hand car it is so fixed that you can sit up straight on the end of a car and hold a shovel and the lever won't interfere with your back unless you sit back too far. The same space, I think, on their car—the Milwaukee car—as our car.

Thereupon the defendant offered in evidence for the pur-
109 pose of impeachment the statement under date of March 23, 1886, shown the witness, Jerry Artery, and hereto attached, marked Exhibit A, which, on objection by plaintiff, was ruled out by the court; to which ruling the defendant at the time excepted.

Thereupon the defendant offered the statement heretofore designated as Exhibit B, which, on objection by plaintiff, was ruled out by court; to which ruling the defendant at the time excepted.

Thereupon the defendant offered the statement heretofore designated as Exhibit C, which, on objection by plaintiff, was ruled out by the court; to which ruling the defendant at the time excepted; thereupon the defendant offered the following, from the statement which was heretofore designated as Exhibit C: "The foreman spoke and said: Two of you men get two shovels and hold them on the rail to throw the snow off or we will never get home. I was the quickest and got a shovel from Kennedy, who had them, when Jim Artery came and took the shovel from me and went and sat on the car. He wasn't told to take the shovel any more than the rest of us. Had he not taken the shovel from me I should have sat on the car instead of him;" which, on objection by plaintiff, was ruled out by the court; to which ruling the defendant at the time excepted.

Thereupon the defendant offered the following from the
110 statement which was heretofore designated as Exhibit C: "At the time of the accident we were not running to exceed three miles an hour;" which, on objection by plaintiff, was ruled out by the court; to which ruling the defendant at the time excepted.

The court, in sustaining the objections, stated that he deemed it

to be the proper method to produce the persons to whom the alleged statements were made and to prove by them what the several witnesses may have said on those occasions.

Thereupon the defendant called JOHN SULLIVAN, who, being duly sworn, testified as follows:

I reside in Dubuque; I am road supervisor on the Illinois Central, from Dubuque to Waterloo; it will be 6 years the 15th of this month. Prior to that I had been railroading for a little over 21 years. I worked on the section for about three years and was about twelve years a section foreman; was never employed on any other railroad but the Illinois Central; have been over other branches of the road beside the road from here to Waterloo; am familiar with other railroads besides the Illinois Central. The section man has to aid in getting the hand car and tools home at
111 night after the day's work is done. I have seen men set on the front of a hand car when there was snow on the rails, which prevented the car being worked by the levers, and holding shovels to take the snow off the rail. I can't say I have seen that done very often. I have seen it and have done it myself. It is only rare occasions that snow is in the condition to require it. On the cars I have been in the habit of using you could sit upright and hold your feet out and hold the shovel on. Except this case here, I never knew of anybody being hurt by sitting in front of a hand car and holding a shovel on the rail to take the snow off the track. Shovels is the only means I have ever seen or used in cleaning the rail. The shovels are held in a man's hand on the rail. I have never seen brooms used for the purpose of putting the snow off the track. I never saw a hand car furnished to section men which had a foot rest in front of it for the men to rest their feet on. If there was half an inch or so of somewhat wet snow on the rail and a freight train was to pass along the line, if it still kept snowing the train would not improve the rail very much for the passage of a
112 hand car, unless you was right close up to the train. I could not answer how soon after the train had gone by the rail would be as bad as it was before. It would depend on circumstances. If I was out here on the most crooked part of our road and the train was due, and I was about ready to start for home, and I couldn't see nor hear the train, I would start for home and listen occasionally as I go along.

Cross-examined:

I don't consider it dangerous to use shovels on the cars we have. I would do it myself in a minute. It is not dangerous to put men on the front end of a hand car to hold shovels to put the snow off the track, when they have to hold their feet up without any rest or anything of that kind, at the speed they expect to get under such condition of track. Never having used a broom, I don't think it is for me to decide which is the safer or better way to get snow off the track, whether by brooms or by the shovel. I think there are some cases where the broom would not work on certain kinds of snow.

Where it would work, I should think, if the broom was attached to the hand car, it would be easier, of course—save two men's
113 time. I don't know about its saving danger, because I never had any accident happen from the use of the shovel.

Thereupon the defendant called CHARLES MCENERY, who, being duly sworn, testified as follows:

I reside at Sibley, Osceola county, Iowa. I am employed at present as road-master on the Burlington, Cedar Rapids & Northern railroad, Iowa Falls Division, extending from Spirit Lake, Iowa, to Worthington, Minnesota, and to Sioux Falls, Dakota, between 115 and '25 miles of road. I have been road-master of that road for about three years. Prior to that I worked for that company as section man, section foreman, extra foreman, track-laying, running construction trains, doing all kinds of construction work. I have never been employed on any other road; am acquainted with other roads in the State; travel over them considerable. I have seen men placed on the front of a hand car to hold shovels to take the snow off the rail as the hand car was propelled over the road a good many times. I have done so myself. The usual way among the section force of getting a hand car over the road, when it cannot be propelled by the levers
114 because of the snow on the rail, is for two men to take shovels, one on each corner of the hand car, and sit down and hold the shovels on the rail and slide the snow off. Until this case I have never heard of anybody being hurt in so holding a shovel in sitting on the hand car. I have never seen a hand car furnished to section men on a railroad provided with a foot-rest for the men sitting down on the hand car to rest their feet on. I have never seen a car furnished to section men on the road equipped with brooms. I have seen brooms used for a gray frost on the rail that would make the top of the rail slipp-y, so that the wheels would not catch, and for a very light, dry snow. These brooms were old brooms that the section men would get and cut the handles off and nail on. I have done so myself. They would not work at all if the snow was somewhat damp upon the rail—that is, it would stop the car. They could not run it. Another thing, it would clog up the front of it. It is the duty of section men and the section foreman to bring
115 their hand car and tools back to the tool-house every evening. The section men are subject to calls at any time, day or night. If the snow was half an inch thick on the rails and a freight train passed along the track, the snow still continuing to fall, the wheels running over the rail with the wet snow would make the top of the rail gummy, and wet snow, a very little, on the top of the rail would make it still more slipp-y for the hand car to run—be harder. Dampness does not affect the rail—that is, rain—but a very little snow will stop a hand car. Whether section crews on a railroad, when they get ready to return home, wait for trains to come before putting their cars on depends upon the lay of the land where they are at work. If it is a straight track and they can see any distance they generally put on the hand car and go, and should it be

on a curve, and a train was due at the time, they may put on their hand car and leave a man to flag until they get around the curve.

Cross-examined:

After they get around the curve on the straight track they stop until that man gets to them. Men may haul a hand car
116 back to the station or may shove it. That is very inconvenient. A hand car can be pushed into the place where it belongs after a snow, providing there is not too much snow upon the rail. It takes a very little at certain times. After it has gone over the rail it will stick on the wheel and run the car off the track. A very light snow certainly it would not. You may push it with wet snow and it would run the car off in a very little time. I have done it. It was on account of the snow that it went off the track. That was a wet, damp snow. A man may take a board to clean the snow off or something else besides a shovel, but it is customary with section men to take a shovel. That is about the handiest tool they have got to do work with. If there was a half inch of snow on the track and a freight train passed, if the car is put on and started and kept right up with the freight train it would certainly be easier to run it, because there would be no snow on the rail. The train will take the snow off the rail.

Thereupon the defendant called G. DAVIS, who, being duly sworn, testified as follows:

117 I reside at Riverside, Washington county, Iowa. I am road-master on the B., C. R. & N., and have been between 8 and 9 years on that part of the road from Muscatine to Monticello and Elmira to Riverside, 115 miles of road. Before I became road-master I was civil engineer, engaged in the constructien of railroads. I first began on the Cincinnati Southern, then on a small road just out of Cincinnati. I forget the name of it. That is 8 years ago. Then I came to the B., C. R. & N. in 1877. My business is to look after the section men—to superintend them. I have seen men placed on the front of a hand car to hold shovels to take the snow off the rails while the car was being propelled along the track, in a few instances. I once sat on a hand car myself and held a shovel; that was this winter. I have seen it done only on the B., C. R. & N. I never knew of any one being hurt holding a shovel while taking the snow off the rail while a hand car was being propelled along the track until this case here. I never saw hand cars fixed with a foot rest attached to the car so that men can rest their feet on them. I never saw them so
118 fixed. I have seen brooms used on a hand car on the B., C. R. & N. They were attached by the foreman of the section and his men. I saw two cars equipped with brooms attached in that way that I remember now; they were old brooms; they would be called refuse brooms, brooms that were picked up. I do not know of any railroad where section hand cars furnished by the company are equipped with brooms or any means of taking snow off the track. I have been on cars when they were used, one

instance that I remember of, in a dry snow. I have not seen the brooms tried when the snow was damp on the rail. The brooms were put into a piece of 2 x 4 by boring a hole through it and sticking the handle up through and wedging it in, and laying the 2 x 4 on the handles that project out from the frames.

Cross-examined:

A very cheap, ordinary broom would answer the purpose.

Thereupon the defendant called CHARLES H. WELCH, who, being duly sworn, testified as follows:

I reported the last trial of this case. I reported the testi-
119 mony of the witness O'Neill. On the last trial of this case he swore, "Those two men got the shovels." He said, some two men. I don't know whether me meant any two men in particular or not. Those two men got the shovels and were seated on the front of the car, and we went on pretty rapid then, right along, until we came to some curve on the road there, and we stopped to listen for that train that was coming after us, and we started up again. We didn't hear her. I don't think we did. I can't remember that we did, anyhow, and we kept on for quite a ways. I think we ran a mile or little more and John Kennedy's shovel got ketched in between the two rails and it flipped right out from him. I think it was either 7 or 8 feet anyhow from the track, and we stopped and got the shovel and he took his position again, and we started on further, and, I think, we stopped once more before this accident occurred to listen for that train, and I don't know as we heard it. I don't remember that we did, and after we started up again we got under pretty good headway.

120 Thereupon the defendant rested its case.

Thereupon the plaintiff was recalled in his own behalf, and testified as follows:

I heard the deposition of Mr. Rellehan read.

Q. I will ask you if this occurred at the time that you started or about the time you started with the hand car: "John Kennedy and John O'Neill took two shovels, one apiece, to sit on the front of the hand car to keep the snow off the rails. James Artery, I think, spoke to O'Neill and said he would take the shovel to keep the snow off the rail?"

A. No, sir; the like never happened. I never heard Rellehan caution me before the car was started to be very careful and keep my feet off the ground. I did not make answer and say that I would look out for that. I recollect about Rellehan being over to the house after I was hurt. I never said to him that if I had done as he told me I wouldn't have got hurt.

Thereupon the plaintiff recalled JOHN O'NEILL, who testified as follows:

After the men took their places on the car with shovels I

121 never heard James Artery speak to me and say that he would take the shovel and keep the snow off the rail. I don't remember hearing Mr. Rellehan cautioning the men before we started to be careful and keep their feet off the ground. I didn't hear them answer that they would look out for that. During the time that Artery was at my place I was there most all the time. I was there several times when Mr. Rellehan was there. I never heard James Artery say that if he had done as Rellehan had told him he would not have got hurt. There was probably a quarter of an inch or half an inch of snow on that rail at the time we started. The snow was falling pretty thick—big flakes of snow. I have many a time followed a freight train on a hand car when the snow was on the track. The running of a freight train along a track that has snow on it takes all the snow off as it goes along quite a distance behind. The hand car will run good after a train. It is easier to follow the train when snow is on the rail than it was to go along the track before any train had gone over it. I should judge I had followed a train in that way about twenty times. I have not seen a
122 hand car stopped by following up a freight train where a light snow as that was on the track. I have in heavier snow. Take such snow as that I saw fall that day—the falling of such snow on the track after the freight train had passed would not in the least prevent the running of the hand car by reason of the gumming of the rail by the falling of snow on it. We had a good track after that train went over it to run on. With the amount of snow on that track and the manner in which it was snowing when the freight train had passed along the road that hand car could have been pumped into Harper's Ferry.

Thereupon the plaintiff recalled JERRY ARTERRY, who testified as follows:

Before the car started, just immediately preceeding the time when these men took their seats on the end to shovel, James Artery did not, as I heard, in speaking to O'Neill, say that he would take the shovel to keep the snow off the rail. I did not hear Rellehan, before the car was started, caution the men to be very careful and keep their feet off the ground. I understood him to say, "Hold up your feet," I think. I heard nobody respond and say that they would look out for that. I took care of James for a great
123 portion of the time when he was lying at O'Neill's house. I was there lots of times when Rellehan was there. I did not hear James say that if he had done as Mr. Rellehan had told him that he wouldn't have been hurt. I have had experience in pumping on a hand car to follow a freight train when there was snow on the track and when it was snowing, a number of times; I couldn't state how many. Whether it would be easier to propel a hand car following a freight train with snow on the track half an inch or less deep, and snowing at the time, than it would be to go along the track before the freight train had gone over it would be according to the snow. We have put it on sometimes, and it run just as good as if it never had snowed on the rail—that is, when we followed a freight

train. Sometimes we put it on, and if it was snowing real hard, maybe it would run quite a ways—maybe as much as a mile—and it would get stuck again. Snowing more on the rail, and the rail being kind of wet after the train going over it, that snow would kind of stick hard on there, if it was snowing hard. It would be some
124 easier for a hand car to be propelled after the running of a freight train over the rails with the snow about as it was on this day; there was about half an inch, or a quarter, maybe, of snow on the rail this day—somewhere between a quarter and a half an inch; some places there was no snow at all. Sometimes it would snow pretty hard and sometimes not so hard, as we were going home.

Cross-examined:

I remember making a statement at Harper's Ferry. I don't know what day of the month it was. I don't remember of saying now how hard it snowed—how much snow there was on the rail. I can't remember saying, "It was snowing at the time quite hard, and there was about an inch of snow on the rail, and it was loose." I don't know whether I said as much as there is in that statement of September 1st, 1886, or not. I remember of Rellehan saying, "Keep up your feet" or "Hold up your feet;" that is all I remember about it.

Q. I want to ask you whether at the time, September 1st, 1886, you made a statement to Mr. Herriman, in which you told him that you remembered distinctly of the foreman cautioning the men to keep their feet up and be careful?

125 A. Well, sir, I don't remember saying all of that. I remember saying something about "hold up your feet," and I do remember that now—of Rellehan saying to them to hold their feet up. I forget whether I stated to Herriman, at Harper's Ferry, on September 1st, that Rellehan said to the men not only to hold up their feet but to be careful also. I don't remember of saying that. I don't remember of saying to Mr. Herriman, at Harper's Ferry, on September 1st, 1886, that Kennedy had two shovels, one of the other men took one of the shovels, when Jimmie said, "I will hold one of them," and took the shovel from him.

Thereupon the plaintiff rested his case.

The foregoing is all the evidence that was introduced or offered by either party on the trial of this case.

Thereupon the defendant asked the court to give each of the following instructions to the jury:

1. The court instructs you that the testimony in this case wholly fails to make out a case of legal liability on the part of the defendant, and you are therefore directed to find a verdict for the defendant.

125*a* 2. The court instructs you that the undisputed testimony in this case shows that it was usual and customary to place section men on the front of a moving hand car to hold shovels on the rails to remove snow that the hand car might be propelled over

the road, in the same way in which plaintiff Artery was placed on the car from which he fell and was injured, and you are therefore instructed that the foreman, Rellehan, was not guilty of negligence in so placing Artery, and that you cannot find the defendant guilty of negligence because Artery was so placed.

3. The court instructs you that there is no proof before you that would warrant you in finding the defendant negligent because of the manner in which the cattle-guard was constructed or the way the ribbons were placed upon it.

4th. There is no proof before you that would warrant you
126 in finding the defendant negligent because of the absence of foot-rests upon the hand car.

5th. There is no proof before you that would warrant you in finding the defendant negligent because of the absence of appliances or brooms from this hand car at the time in question to clear the snow from the rail.

6th. There is no proof before you that would warrant you in finding the defendant negligent in furnishing the section crew an unsafe, unfit, or improper hand car.

7th. The court instructs you that plaintiff must be presumed to have had knowledge of the danger of his position on the hand car which common observation would force on a man of ordinary intelligence.

8th. The court instructs you that the plaintiff, having engaged himself in the service of a section man, *he* thereby held himself out as competent to perform such service, and the section foreman, in giving him orders, had the right to assume that he understood them and the method in which they should be obeyed and carried out, if you believe from the evidence that the orders which he did give were such as is usual and customary for section foreman to
127 give under the circumstances which existed at the time the order in question was given.

9. The court instructs you that when a person of apparently sufficient age, physical ability, and mental calibre to perform the service seeks employment at the hands of a railway company he is held to an implied representation that he is competent to perform the duties of the position he seeks and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. In such a case there is no rule of law which compels the company to pass him through an examination to discover his competency for the place, and in dealing with him in the service he undertakes the company is justified in assuming that he — competent for the purpose, and, in assuming, will properly act, on all orders given in the usual and ordinary manner in the conduct of the business. Applying this rule to this case, if you believe that the order and direction which Foreman Rellehan gave to the plaintiff to sit upon the end of the hand car and hold a shovel on the rail was an order or direction that is usually and customarily given under like circumstances, then I charge you that he, Rellehan, had the right
128 to assume that the plaintiff was competent to fulfill the order

in a proper manner, and that plaintiff fully understood the risks and hazards attending the execution of it.

10. The court instructs you that the undisputed evidence in the case shows that it was the duty of the plaintiff, along with the other section men, to assist in getting the car and tools to the section-house at Harper's Ferry. If you believe that the work which the section foreman required plaintiff to do in getting the car back was a usual and customary requirement under such circumstances, then the mere giving of the order or the requirement of such service was not negligence, and plaintiff cannot recover damages because of injuries sustained by him in performing in such service.

11. The court instructs you that, whether service which plaintiff was required to perform in sitting on the hand car and keeping the snow from the rail was or was not within the line of his employment, he cannot recover from defendant in this case for injuries suffered by him while so doing if the risk and danger of the work he was em-
ployed in was as patent to him as to the foreman or would
129 have been known to him by the exercise of ordinary diligence on his part.

12. If you believe from the evidence that plaintiff could have stopped the car at any time after it started by withholding his shovel from the rail, and that instead of doing this he continued to hold his shovel upon the rail without complaint until he became so exhausted that he could no longer hold his feet up or properly hold the shovel, and because of his exhaustion his shovel caught on the rail or his foot on the ribbons of the cattle-guard and he was thrown and injured, you are instructed that he was guilty of such contributory negligence that he cannot recover in this action.

13. If you believe that plaintiff continued to sit upon the car and hold his shovel upon the rail without complaint and without asking to be relieved until he became so exhausted that he could no longer properly hold the shovel or no longer hold his feet up from the track, and either by striking his feet or the shovel on the ribbons or on the rail he was thrown from the car, he was guilty of such contributory negligence that he cannot recover in this action.

130 Which the court refused as to each instruction; to which said several rulings defendant at the time excepted.

And thereupon the court, on its own motion, instructed the jury as follows:

Judge's Charge to the Jury.

GENTLEMEN OF THE JURY: In this case the claimant, James Artery seeks to recover from the defendant, The Chicago, Milwaukee & St. Paul Railway Company, damages in the sum of $20,000 for injuries which he alleges he received whilst in the employ of the company as a section man, engaged in working upon the section commencing at Harper's Ferry and extending northwardly a distance of some miles from that place. He avers in his petition that, as I have said, whilst thus engaged in the employ of the company he received these injuries, and that they were caused by certain acts

of negligence which he charges against the defendant company. He avers in the petition that the hand car which he and the other men were required to work with was too small, and that at the time when the accident happened the car was started to go home—
131 that is, to go back to Harper's Ferry, which was the home of the plaintiff and the other section men who were engaged with him, and that the car was started by the foreman, who was in charge thereof, on the time of a freight train that was then due, coming southward upon the road; that the hand car which he, with the other men, was on was run at a dangerous rate of speed, and that this hand car was not furnished with the necessary and proper appliances that the company should have had upon it for the purpose of keeping or brushing snow off the track in case snow did fall upon the track, and also that the car was defective in not having a proper brake and defective in not having a foot-rest—a place for the men to place their feet on when they were placed upon the front of the car, as the plaintiff claims that he was in this case. The plaintiff also claims that the cattle-guard, where the accident happened, was in bad order; that the ribbons—the pieces that are placed upon the cattle-guard that are known by the names of ribbons—projected somewhat above the top of the rail, and that with the car in the condition that he avers and the track
132 in the condition in which he avers it was, he, the plaintiff, was required to place himself, by the order or direction of the foreman, upon the front end of the hand car and to hold a shovel down for the purpose of keeping the snow or brushing the snow off one of the rails forming part of the track over which the hand car had to pass in going to Harper's Ferry. And it is upon these several allegations the plaintiff claims negligence on the part of the railroad company which directly contributed to the accident in which he received the injury of which he complains. The company, in its pleadings in its answer, denies, in the first place, all these several allegations of fact or several allegations of negligence that are made against it, and then avers, as an affirmative defense, that the plaintiff himself was guilty of negligence, of what is known as contributory negligence—negligence upon his part which aided in causing or producing the accident. This is based upon the well-recognized principles of law, that where a person, by negligence upon his part, contributes to or aids in causing an accident, from which accident injuries result to him, he cannot recover damages
133 therefor against another party, no matter how negligent the other party may have been. Where the negligence of the two—of a plaintiff and defendant, for instance, in a suit—concur and it appears from the evidence that the negligence of both parties concurred in producing the accident, that defeats the right of recovery on the part of the person who received the injury; the law not attempting to separate the consequences of the negligence of both parties, but defeating entirely the right of the person who has received an injury to recover therefor. It is also pleaded in the answer of the defendant that the plaintiff entered into the employment of the railway company as a section man; that he was pre-

sumed to know the condition of the track, the character of the hand car, its condition, and what was expected and demanded of him in his service as a section man, and that he assumed all the risks which pertained to the business as it was carried on there, and that this accident was one of the risks and hazards which belonged to the business in which he was engaged, and therefore he cannot recover therefor against the company, it being viewed as, what we
134 term in law, a pure accident, for which no person is responsible—that is, responsible in the sense of being compelled to respond in damages to the person who has received injuries therefrom.

Now, this, gentlemen, is a very brief statement of the several allegations that are made in the respective pleadings of the parties. They have been read in your hearing in the opening of the case, and it is not necessary for me to dwell at any greater length upon them. You will notice from the statement of them that the real questions that you are called upon to determine under the evidence and law in this case are questions that are based upon these allegations of negligence. Now, it is not sufficient in a case of this character or in this case, to enable the plaintiff to recover, for him simply to show that he was in the employ of the railway company, and whilst in the employ of the company he received an injury; that there was an accident happened and injury resulted therefrom to him. In the first instance, the plaintiff must go further than that. He must show not only that he was in the employ of the railroad company, and that an accident happened, and that injury
135 resulted therefrom to him, but that this accident and consequent injury resulted from some negligence upon the part of the railway company. Then, in addition to that, even if that appeared, if it also appears from the evidence that the plaintiff himself, by negligence upon his part, contributed to the accident, that would defeat his right of recovery. Now, gentlemen, as is, of course, well known, there are various kinds of business and avocations of life which have inherent in them, from the very nature of the business itself, greater risks and hazards to life and limb than pertain to the ordinary business callings. This business of railroading is one of the classes of business in which, from the character of the appliances that are used, the machinery that is used, and what men are required to do in and about carrying on the business of railroading, even when the business is carried on in a proper manner, there are greater risks and greater hazards to life and limb involved in it than there are in the usual and ordinary avocations of life, and the rule of law is that when a person enters into an employment which has necessarily connected with it these greater
136 risks and hazards he is presumed to have himself assumed these ordinary risks and hazards that pertain to the business. But, gentlemen, what is meant by that is this, that the employee, going into the employ of the railroad company, for instance, simply assumes himself the risks and hazards that pertain to that business when it is carried on in a proper manner. He does not assume the risks and hazards as part of his employment that result from negli-

gence or want of proper care on the part of the railway company or its various employees. The duty and obligation is placed upon the railway company of using due care—that is to say, ordinary care—in the management of its business to protect its employees from unnecessary risk and hazard. The very fact that the railroad business, when properly carried on, has connected with it risks and hazards to life and limb does not excuse the company from exercising due care; but, on the contrary, rather makes it more imperative upon the company to see to it that no unnecessary risk or hazard is caused to its employees—that is to say, makes it imperative upon the company to use ordinary care to see that no unnecessary risk
137 or hazard is cast upon the employees. Now, the degree of care that is required of the company is what is termed "ordinary care," which may be defined to be that degree of care which men of ordinary prudence would and should exercise in and about the particular circumstances or the particular business in which they are engaged. When human life and human limb are involved, then, in the exercise of ordinary care, it is required that the company or the person who is charged with the duty of exercising this care shall take greater precaution than when they are not involved. Now, this is simply the usual and ordinary rule that obtains with us in all our business dealings. We all recognize the fact that when interests of a greater moment are involved we are required to exercise greater care. Even leaving aside life and limb, if property of large amount and great value is involved we feel that ordinary care requires us to exercise greater precaution than if property of but little value is placed in our hands; and so the law recognizes human life and human limb as demanding at the hands of the company and of its employees that care—a higher degree of care, or rather a higher degree of precaution than if they
138 are not involved. The railroad companies are not insurers of the life and limbs of their employees. As I have said, all the obligation that the company owes to the employees is to exercise this ordinary care. The degree of care and caution that is required of the railroad company towards its employees is not of as high a degree as is due to a passenger. Wherever a passenger's rights are involved a different rule is laid down. There what is called in law extraordinary care is required at the hands of the common carrier, or railway company, but between the company and its employees the rule, as I have said, is ordinary care. Now, on the other hand, the employee is under like obligation upon his part to exercise ordinary care for his own protection. He is not justified in recklessly or carelessly subjecting himself to risks and hazards and, if he receives an injury thereby, then looking to the railway company for recompense therefor. If, by the use of ordinary care on his part, he can protect himself it is his duty so to do, and if he fails in doing that and an accident happens to him, which is
139 the result of the combined negligence of the railway company or its employees and the negligence of the party injured, then, as I have already said, that would defeat the right of recovery on the part of the person injured. Both parties, both the employer

and employed, both the railway company and those in its employ, are under equal obligation to exercise, as I have said, this ordinary care—the one for the protection of those in its employ and the employees themselves for their own protection against the risks and hazards that surround them. Then, gentlemen, as I have said, the general questions *are* involved are questions of negligence. As I have already said, it is not sufficient to entitle the plaintiff to recover for him simply to show that he received an injury while in the employ of the railway company. He must satisfy you by a fair preponderance of the evidence that this injury resulted from some accident which was caused by negligence on the part of the railway company—that is, that the railway company under the given circumstances failed to exercise this degree of ordinary care which is required of it in its dealings with its em-
140 ployees. As has been stated to you, gentlemen, by counsel in the argument of this case, there is not a great deal of dispute upon many of the facts of the case. The general facts are not in dispute really between the parties. The evidence that has been introduced on both sides as to a majority of the facts surrounding this transaction is agreed. There is no dispute, for instance, that the plaintiff on the 5th day of March, 1885, was in the employ of the defendant company as a section man, engaged in the work required of section men, on the section extending from Harper's Ferry northward. There is no dispute but what upon that day the section gang under the charge of Rellehan, the foreman, went out as usual upon the section; that they had along with them their hand car and tools; that they were engaged in and about the work of the company; that in the afternoon, in the neighborhood of 5 o'clock, the foreman directed the men to gather up their tools and put the hand car upon the track for the purpose of returning to Harper's Ferry, which is the home of the gang and the place to which it was their duty to return; that there was snow falling dur-
ing the afternoon, which had, to a greater or less extent,
141 covered the rails upon the track, and that the men endeavored, under the direction of the foreman, to move the hand car along the track, but that after moving it some short distance, owing to the snow upon the track, they found that they could not make any headway by the ordinary pumping upon the levers of the machinery upon the hand car. It is not in dispute, under the evidence in the case, that the plaintiff and another one of the men, Kennedy, placed themselves upon the front end of the hand car and held the shovels down upon the rail for the purpose of clearing the snow off the track; that they proceeded along for some little distance in this way; that the shovel in the hands of Kennedy was thrown out of his hands by striking some obstruction probably or something upon the rail or upon the track in some way—at least it was struck out of his hands; the car was stopped, this shovel was obtained; then that they continued on down until they reached the point where the accident occurred in which the plaintiff was injured, and that the plaintiff, being seated upon the front end of the car and holding the shovel down upon the rail for the purpose of clearing the

142 snow off the same, in some way was thrown off the car and under it and received very serious injuries.

The evidence shows, gentlemen, that immediately after the accident happened there came along a freight train. The plaintiff himself having been removed and the hand car removed from the track, the freight train passed by, and then the men placed the hand car again upon the track and placed the plaintiff upon it and brought him to Harper's Ferry.

The questions that are in dispute, gentlemen, are, in the first instance, as to whether or no the plaintiff has, by a fair preponderance of the evidence, satisfied you that this accident was due, in the first instance, to negligence upon the part of the defendant company. Now then, gentlemen, it seems to me that this question turns upon this: Taking that track just as it in fact was, as you find it was, under the evidence in this case—taking its condition as it then was, taking all the facts and circumstances surrounding the parties as they then were and as they are shown by the evidence to have been; taking the car just as it was, just of the size it was, and
143 just in the condition it was, without any brooms or other appliances upon it for the purpose of pushing off snow—was it or was it not negligence upon the part of the section foreman to require the plaintiff and Kennedy, these two men, to place themselves upon the front of the car and hold shovels down on the rails for the purpose of cleaning off the snow therefrom, and continue them in that position up to the time that the accident happened to the plaintiff in this case? In the first place, gentlemen, the duty, as I have already said, is upon the railway company to use ordinary care in the management of the hand car under these circumstances and the control of the men that were under the foreman, Relehan, who was in charge of them. In that regard he was the railway company and represented it, and his orders and directions, given under those circumstances, are the orders and directions of the railway company, and if, in the giving of them, he was guilty of negligence, that negligence is the negligence of the railway company, for which they would be responsible to any person who is injured thereby. As I have already said, gentlemen, the duty and obligation is upon the company and its employees to exercise
144 ordinary care for the protection of its men, its employees. A person is not justified, standing in the position that the foreman does over a gang of section men—is not justified, for mere convenience sake, in causing them to place themselves where they shall be subject to unnecessary risk and hazard to life and limb. The duty and obligation is always present upon the company, through the person who stands in its employ, as the foreman does, in charge of men, as I have said, to exercise ordinary care to protect the men against unnecessary risk and hazard. The meaning of that is that he must not himself unnecessarily subject them to a risk and hazard greater than the ordinary circumstances would demand of them in the performance of their duty to the railway company. Now, then, gentlemen, you will have to decide the question of whether placing the men in this way upon the front of this car, as I have said, sub-

jected them to unnecessary risk and hazard of life or limb. The testimony is somewhat variant upon the exact language or words that were used by the foreman in directing the men to place
145 themselves upon the front of the car. I understand there is no dispute under the testimony, and it is not claimed by counsel, as I understand it, in the argument before you on behalf of the company, but what Relehan, the foreman, gave some direction upon this subject-matter to the men that were under his employ. Now, then, in that position of the case and in the legal aspect of it, it makes no difference whether Relehan, the foreman, gave a direction or order directly to Artery by naming him or by pointing his finger at him, saying, "You"—indicating him by the finger or even name—"take your seat here with a shovel," or whether he said, "Boys" or "Two of you men or two of you boys, take shovels and set down here." If he gave the command generally to the men, to the whole of them, and Artery, as one of the men, obeyed that command and took a shovel by reason of the command being addressed to the section men and sat down there, legally it is just the same, and places him in exactly the same position as though the foreman had said to him by name, "Artery, take a shovel and set down there."

Therefore, gentlemen, as I have —, the question is, whether
146 taking into account the exact situation as it then was, whether or no you find, under the evidence, that Relehan, and through him the company, was guilty of negligence, the want of ordinary care, in requiring the plaintiff to place himself upon the front end of the car and hold the shovel there for the purpose of clearing the snow off the track, and continuing him in that position until the accident happened.

Now, then, gentlemen, of course you are to view this, placing yourself as near as you can in the exact position that the parties occupied at that time. The question as to the original giving of the order, of course, is to be determined—whether there was neg*ne*gence in giving that or not, as the facts were and as the matter would appear to Relehan at the time he gave the order; but this was also a continuing matter. It was not a duty that was performed in an instant. "The order requiring him to place himself upon the front of the car required him to remain there for a time, and the uncontradicted evidence shows he did remain upon the front of the car, holding this shovel for a period of time. Now, then, the question
is also whether the plaintiff, by a fair preponderance of
147 the evidence, has satisfied you that there was negligence on the part of Relehan in continuing these parties, continuing the plaintiff particularly, upon the front end of the car up to the time that the accident happened to Artery himself.

I do not know, gentlemen, that I can give you any further instructions upon this particular branch of the case, upon the law of it, that would aid you in solving the question that is submitted to you. All the questions of fact are for you to determine." The question of the credibility of witnesses, how much weight you will give their evidence and how credible they may be, the impressions

their evidence makes upon you—in determining all these questions you are the judges; that belongs to your province, and it is for you to determine all the questions of fact, including the question whether or no the evidence satisfies you, under the instructions I have given you, whether the defendant company was guilty of negligence in that through the direction of the foreman the plaintiff was required to place himself upon the front end of the car and continue there, holding the shovel for the purpose of clearing the snow off the track, up to the time the accident happened to him. "Now, then, if the evidence
148 fails to satisfy you that this was negligence upon the part of the company, through its foreman, of course that is the end of the case. Then the plaintiff has failed to prove the fundamental question upon which his case rests, to wit, this charge of negligence against the railway company. If, on the other hand, you nd there was negligence; that it was a negligent act upon the part of the foreman to require the plaintiff to thus place himself upon the car and to do the duty that was required of him, then you are next to inquire whether or no the defense of contributory negligence has been made out. As I have already said, gentlemen, the duty and obligation is upon the employee to use ordinary care on his part for his own protection. He is not justified in carelessly or recklessly running into danger or subjecting himself to danger as a rule. This is the general principle. On the other hand, you will understand, gentlemen, that where an employé, like a section man, is under the control of persons who are placed over him that his primary duty is obedience. He is expected to obey the commands and orders given to him by the officers or those who are placed in charge over him, who have the right to direct his movements; and, again, the
149 party has a right to expect that the company will, through these officers, exercise a- ordinary care upon its part for his protection, and that in the giving of an order or requiring him to place himself in any particular position or particular place or to undertake any particular duty in a particular way he has a right, in the first place, to assume that in so doing the company have exercised this ordinary care and are, in the exercise of that ordinary care, justified in giving him the order; but if, when the order is given, it is apparent to him or should be apparent to him, in the exercise of ordinary care under the circumstances, that he will be subjected to a risk and hazard that he ought not to take upon himself, then the law will require of him that he should refuse to take this risk upon himself.

Now, gentlemen, these are questions which, of course, the jury will have to apply to the particular facts and circumstances that are before them. As I have said, here, on the one, hand is the employee; the duty that is expected of him is obedience to the command that is given to him. He has a right to expect, as I have already said, that in giving these commands and directions that due care
150 has been exercised by the person who gives them that he will not be required to subject himself to unnecesssary risk.

Therefore, when a person is in the employ of a company and obeys a command given to him, before the jury are justified in say-

ing he is guilty of contributory negligence in thus obeying this command the evidence must be such *be such* as to satisfy you clearly that the risk he was subjected to was such that no one but a reckless man would have obeyed the command thus given. In other words, when he did obey the command it was so apparent to him he would be subjected to this risk that he was reckless in doing it. There is a difference between cases of this kind and a case in which the command is given to do some specific thing, but not in any specific manner. To use the illustration referred to by counsel in his argument—that is, a conductor may order a brakeman to go and couple a car. He does not direct him as to the mode in which he shall couple it; that is left to the brakeman. The brakeman may go in and do it in a careless manner, and if in doing it in a careless manner he suffers an injury he cannot turn around and say, "I was commanded to go in and make that coupling," &c. That is
151 part of his duty. The mere order to couple the car ordinarily would not show there was any negligence on the part of the conductor in giving such order; but if the command is to do some specific thing in a specific manner then, as I have said, the first duty that is expected from the employee is obedience to that specific command—to do it in that specific manner; and, as I have already said, the employee who receives that order has a right to suppose that the person who gave it has exercised ordinary care in determining whether or no he should be required to do this specific thing in that specific manner; and, in the first place, therefore, they expect from these employees, under those circumstances, obedience to the order; but, as I have already said to you, notwithstanding that, if the danger and the risk is so apparent that it would be reckless of a man to expose himself to it, then it would be his duty, even under those circumstances, for the employee to refuse to assume the risk and refuse to obey the order given to him.

It is for you, then, gentlemen, to say, under the circumstances of this case, whether you find that the plaintiff was guilty of
152 contributory negligence in placing himself upon the car, in undertaking to do the duty that was required of him, if you find it was required of him by the command of the foreman in this case. Then, again, it is for you to say, gentlemen of the jury, whether it appears, by a fair preponderance of the evidence, that in the doing of the work the plaintiff himself was guilty of negligence which aided in causing the accident—that is, whether he negligently suffered his limbs to fall or was negligent in handling the shovel, or in any manner was so negligent in carrying out the duty, or was careless, rather, in the manner of carrying out the duty required of him as that you find he was himself guilty of negligence which contributed to the causing of the accident. Then, gentlemen, if you find upon either of these issues for the defendant, of course that ends the case, and your verdict must be for defendant. If you find, however, under the instructions I have given you as applied to the facts of the case, that, in the first place, the accident was due to negligence on the part of the railway company, and you do not find
153 that the plaintiff himself contributed, by negligence on his part,

to the happening of the accident, then your verdict would be for the plaintiff, and you will then be required to ascertain and determine the amount of damages you will award to the plaintiff in the case. Now, gentlemen, the elements of damage which you are to take into consideration in a case of this kind are, first, the actual expense and outlay that the plaintiff may have been put to, and which you may find under the evidence he will be put to in the future in and about having himself taken care of, his medical attendance, his nursing, and the attendance that may have been required in the past or may be in the future actually required by reason of the condition in which he is; second, he is entitled to fair remuneration for the pain and suffering that has been caused and may be caused to him in consequence of the injuries he received in this accident; third, to fair compensation for the pecuniary loss caused to him by reason of his inability to labor, if you find from the evidence that the accident has been of such a character as to deprive him, either in whole or in part, of his ability to labor in the past, and that that will continue in the future, either permanently or for a shorter
154 or greater period of time, the plaintiff is entitled to recover a fair sum as compensation or remuneration for this pecuniary loss.

Now, you will notice, gentlemen, that as to the two latter items of expense it is impossible for parties to give evidence that will enable you to ascertain them as you would figure up damages in many other cases. You cannot tell mathematically any exact sum that would represent the suffering that a person may undergo; neither can you tell the exact amount that would represent the pecuniary loss to the party under the circumstances, because there are so many contingencies that inhere in cases of this kind that it is impossible to do it. Now, all that can be done under those circumstances and all the law requires is for the parties to bring in all the circumstances that bear upon it and surround the party, and submit the question to the sound judgment of the jury. In other words, it is proper to submit to the jury the age of the party, his condition of life, ability to labor, the amount he was earning, and the probable expectancy of his life All these are facts and circumstances
155 that are brought before you in order that you may take them into consideration; but you are not justified, in cases of this kind, in assuming that the party would live out the entire length of time and earn the amount of money he has earned from day to day and figure up that he has lost absolutely that much. We cannot reach it by mathematical figuring in that way, because, of course, as you all know, it is impossible to tell if this accident had not happened how long the plaintiff would live. He might die to-morrow; he might live until the end of the year. He might live even a greater length of time than the tables of mortality would show; so, in regard to the earnings, you cannot tell how much he would have earned absolutely. He might have met with other accidents, or through disease might be disabled, or, on the other hand, he might have increased facilities for earning money. We do not know what the facts are absolutely in regard to these things; hence all con-

tingencies are uncertainties that inhere in these matters. You must take all into account and give a fair allowance to them all. By taking all the facts and all the circumstances it is, then, for
156 you to say, exercising your sound dispassionate judgment, what fair sum will compensate the plaintiff for the injuries and consequent damages which you find have been caused to him by the accident, and the results to him from it.

Your verdict, gentlemen, in either case, will be in writing and will be signed by your foreman and will be in one of two forms, entitling the case James Artery against The Chicago, Milwaukee & St. Paul Railway Company: "We, the jury, find for plaintiff and assess his damages at ——," whatever sum you may find, if you find for the plaintiff. If you find for defendant, by entitling the case "James Artery against The Chicago, Milwaukee & St. Paul Railway Company. We, the jury, find for the defendant," signed by your foreman, and be returned into court.

The following portions of said charge of the court to the jury the defendant, by its counsel, at the time duly excepted, and the exceptions were allowed and noted, viz:

"The questions that are in dispute, gentlemen, are, in the first instance, as to whether or no the plaintiff has, by a fair preponderance of the evidence, satisfied you that this accident was due,
157 in the first instance, to negligence upon the part of the defendant company. Now then, gentlemen, it seems to me that this question turns upon this: Taking that track just as it in fact was, as you find it under the evidence in the case—taking its condition as it then was, taking all the facts and circumstances surrounding the parties as they then were and as they are shown by the evidence to have been; taking the car just as it was, just of the size it was, and just in the condition it was, without any brooms or other appliances upon it for the purpose of brushing off snow—was it or was it not negligence on the part of the section foreman to require the plaintiff and Kennedy, these two men, to place themselves upon the front of the car and hold the shovels down on the rails for the purpose of cleaning off the snow therefrom, and continue them in that position up to the time that the accident happened to the plaintiff in this case."

Also to the following portion of said charge defendant, by its counsel, at the time duly excepted, and the exception was allowed and noted, viz:

"The duty and obligation is always present upon the com-
158 pany through the person who it stands in its employ, as the foreman does in charge of men, as I have said, to exercise ordinary care to protect the men against unnecessary risk and hazard. The meaning of that is that he must not himself unnecessarily subject them to a risk and hazard greater than the ordinary circumstances would demand of them in the performance of their duty to the railway company. Now, then, gentlemen, you will have to decide the question of whether placing the men in this way upon the

front of this car, as I have said, subjected them to unnecessary risk and hazard to life and limb."

Also to the following portion of said charge the defendant, by its counsel, at the time duly excepted, and the exception was allowed and noted, viz:

"Therefore, gentlemen, as I have said, the question is whether, taking into account the exact situation as it then was—whether or no you find, under the evidence, that Relehan, and through him the company, was guilty of negligence, the want of ordinary care, in requiring the plaintiff to place himself upon the front end of
159 the car and hold the shovel there for the purpose of clearing the snow off the track and continuing him in that position until the accident happened."

Also the following portion of said charge the defendant, by its counsel, at the time duly excepted, and the exception was allowed and noted, viz:

"The order requiring him to place himself upon the front of the car required him to remain there for a time, and the uncontradicted evidence shows he did remain upon the front of the car, holding this shovel, for a period of time. Now, then, the question is also whether the plaintiff by a fair preponderance of the evidence has satisfied you that there was negligence on the part of Relehan in continuing these parties—continuing the plaintiff particularly—upon the front end of the car up to the time that the accident happened to Artery himself."

Also to the following portion of said charge the defendant, by its counsel, at the time duly excepted, and the exception was allowed and noted, viz:

"I do not know, gentlemen, that I can give you any further instructions upon this particular branch of the case—upon
160 the law of it—that would aid you in solving the question that is submitted to you. All the questions of fact are for you to determine."

Also to the following portion of said charge the defendant, by its counsel, at the time duly excepted, and the exception was allowed and noted, viz:

"It is for you to determine all the questions of fact, including the question whether or no the evidence satisfies you, under the instructions I have given you, whether the defendant company was guilty of negligence in that, through the direction of the foreman, the plaintiff was required to place himself upon the front end of the car and continue there, holding the shovel for the purpose of clearing the snow off the track, up to the time that the accident happened to him."

Also to the following portion of said charge the defendant, by its counsel, at the time duly excepted, and the exception was allowed and noted, viz:

"Now, gentlemen, these are questions which, of course, the jury will have to apply to the particular facts and circumstances that are before them. As I have said, here, on the one hand, is
161 the employee. The duty that is expected of him is obedience

to the command that is given to him. He has a right to expect, as I have already said, that in giving these commands and directions due care has been exercised by the person who gives them; that he will not be required to subject himself to unnecessary risk. Therefore, when a person is in the employ of a company and obeys a command given to him, before the jury are justified in saying he is guilty of contributory negligence in thus obeying this command the evidence must be such as to satisfy you clearly that the risk he was to be subjected to was such that no one but a reckless man would have obeyed the command thus given; in other words, when he did obey the command it was so apparent to him he would be subjected to this risk that he was reckless in doing it."

Also the following portion of said charge the defendant, by its counsel, at the time duly excepted, and the exception was allowed and noted, viz:

"There is a difference between cases of this kind and a case in which the command is given to do some specific thing, but
162 not in any specific manner. To use the illustration referred to by counsel in his argument—that is, a conductor may order a brakeman to go and couple a car. He does not direct him as to the mode in which he shall couple it; that is left to the brakeman. The brakeman may go in and do it in a careless manner; and if in doing it in a careless manner he suffers an injury he cannot turn around and say, 'I was commanded to go in and make that coupling.' That is part of his duty. The mere order to couple the car, ordinarily, would not show there was any negligence on the part of the conductor in giving such order; but if the command is to do some specific thing in a specific manner, then, as I have said, the first duty that is expected from the employee is obedience to that specific command—to do it in that specific manner; and, as I have already said, the employee who receives that order has a right to suppose that the person who gave it has exercised ordinary care in determining whether or no he should be required to do this specific thing in that specific manner; and, in the first place, therefore, they expect from these employees, under these circumstances, obedience to the order;
163. but, as I have already said to you, notwithstanding that, if the danger and the risk is so apparent that it would be reckless of a man to expose himself to it, then it would be his duty, even under those circumstances, for the employee to refuse to assume the risk, and refuse to obey the order given to him."

Thereupon the jury retired and afterwards returned into court with a verdict in favor of the plaintiff and against the defendant, and assessing the plaintiff's damages at thirteen thousand five hundred dollars.

And because none of said matters, except said verdict, appear of record the foregoing bill of exceptions, having been examined and found by the court to be conformable to the facts, is hereby allowed, signed, and sealed by me, the judge before whom the said suit was had.

O. P. SHIRAS, *Judge.* [SEAL.]

164 EXHIBIT A.

Statement of Jerry Artery, Sec. 4man.

HARPER'S FERRY STATION, *March* 23, 1886.

James Artery is my bro. Before he got hurt he had ridden about one and a half miles sitting on the front of the hand car and holding a shovel on the rail to clean the snow off the rail so we could pump the car. It was snowing at the time quite hard. There was six of us in all on the car. Jim Artery sat on the left-hand corner of the car and John Kennedy on the right. I was standing between the levers on the left-hand side. A. Donlan and O'Neill were behind. Relehan, the foreman, was standing between Jim and Kennedy. At the time Jim got hurt we were running from 4½ to 5 miles an hour, certainly not to exceed 5 miles. There was about an inch of snow on the rail at the time, and it was lo-se. There was three of us pumping besides the foreman. I do not know if Jim ever sat down on the car before. I have often done it. The snow was soft and sticky; it gathered on the shovel, and Jim struck the shovel on the end of a tie to knock off the snow. He had only just
165 put the shovel back onto the rail when he fell off. I cannot say just what threw him off. It was done either by his shovel catching in expansion (space between the rails) or the rails, or else his foot caught on one of the ties of the cattle-guard. Six men on a hand car would have plenty of room. We often had eight and ten men on a hand car of the same size. I am a larger man than Jim ever was, and my legs are a great deal longer. I have never had any trouble in keeping my feet up when I sat on the front of the car. If a man is holding a shovel on the rail and he is sitting on the front of a hand car there is no way for him to get hurt unless he forgets himself and lets his feet drop down. The snow was not drifting any at the time of the accident. The hand car was in good condition, nothing broken about it in any way. It was an ordinary car, full size. I am foreman at present on section No. 20. The top of the ribbons on the ties of the cattle-guard was about level with the ball of the rail. It is customary for section men to do just what Jim was doing at the time he got hurt.

JERRY ARTERY.

Witness:
H. A. BUEL.

166 EXHIBIT B.

HARPER'S FERRY STATION, *Sep.* 1, 1886.

I remember that we started and ran about half a mile when the snow stopped the hand car. It was then that the foreman said, Two of you get shovels and hold them on the rails or we won't get home to-night. Kennedy had two shovels. One of the other men took one of the shovels, when Jim said, I will hold one of them, and took the shovel from him. We were not running over four or five miles per hour at the time of the accident. I remember distinctly

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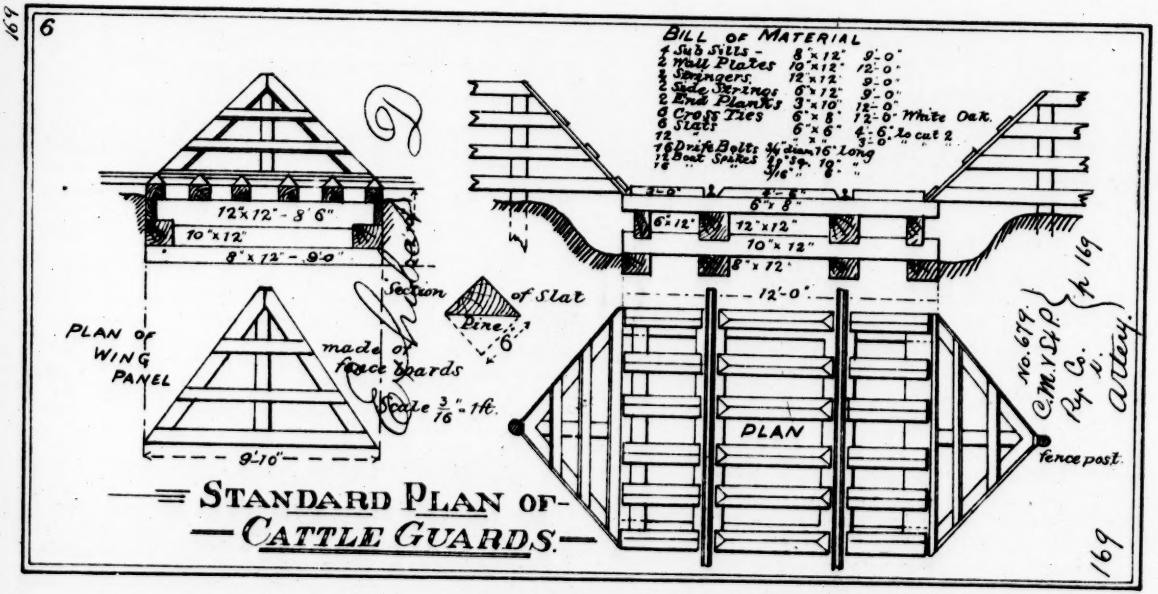

STANDARD PLAN OF CATTLE GUARDS.

169

of the foreman cautioning the men to keep their feet up and be careful. I am not positive, but think Jim had held the shovel before. I was watching Kennedy, because I was afraid he would get hurt, as I didn't think he had ever held the shovel before.

JERRY ARTERY.

167 EXHIBIT C.

Statement of J. H. O'Neill.

HARPER'S FERRY, *April* 1, 1886.

At the time of the accident we were not running to exceed (3) three miles an hour. At the time I stood on the left-hand corner of the car at the rear. I had my eye on Jim Artery about all the time. I saw him when he struck his foot against the ribbon. That threw him under the car like a jackknife. It was snowing at the time; also snow on the rail. I never sat on the car to hold a shovel. The foreman spoke and says, Two of you men get two shovels and hold them on the rail to throw the snow off, or we will never get home. I was the quickest, and got a shovel from Kennedy, who had them, when Jim Artery came and took the shovel from me and went and sat on the car. He was not told to take the shovel any more than the rest of us. Had he not taken the shovel from me I should have sat on the car instead of him. The car was loaded with tools. The hand car was made for six (6) men. The car was all right. We had stopped once or twice before that to shovel snow off the track.

I worked on the track (3) three years. It was customary for
168 some of the men to sit on the car in winter, when it was necessary to throw off the snow. I never saw or knew of any one getting hurt doing as Jim did.

JOHN H. O'NEILL.

Endorsed: No. 291. Law. James Artery *vs.* C., M. & St. P. R'y Co. Bill of exceptions. Filed 23 day of June, 1887. Alfred Hobbs, deputy clerk.

(Here follows diagram marked page 169.)

170 NORTHERN DISTRICT OF IOWA, *ss:*

I, A. J. Van Duzee, clerk of the circuit court of the United States for the northern district of Iowa, do solemnly certify that the foregoing is a true and perfect copy of the record in the case of James Artery *vs.* The Chicago, Milwaukee & St. Paul R'y Co. as fully as the same remains on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said cour,t at my office, in Dubuque, this 5th day of August, A. D. 1887.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE, *Clerk,*
By ALFRED HOBBS, *Deputy.*

171 THE UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

Pleas before the circuit court of the United States in and for the northern district of Iowa, eastern division, at a term begun and holden at Dubuque, in said district, on the third Tuesday of November, A. D. 1885, before the Hon. Oliver P. Shiras, judge of said court.

JAMES ARTERY, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY. } Law. No. 291.

Be it remembered that on the 24th day of September, 1888, an assignment of errors in the above-entitled cause was filed in the office of the clerk of the United States circuit court in and for the northern district of Iowa in the words and figures following, to wit:

172 In United States Circuit Court for the Northern District of Iowa, Eastern Division.

JAMES ARTERY
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Defendant in the above-entitled case says there is manifest error in the record in said case in the following particulars, to wit:

First. It was error to permit the witness, James Artery, against defendant's objection, to answer the question propounded to him wherein he was asked whether he had ever before been ordered to hold a shovel on the rail.

Second. It was error to permit the witness, James Artery, against defendant's objection, to answer the question propounded to him wherein he was asked whether he had ever before seen a shovel held on the rail for the purpose of cleaning the track of snow.

Third. It was error to permit the witness, James Artery, against defendant's objection, to answer the question propounded to him wherein he was asked whether he knew anything about the
173 hazard or danger connected with the holding of a shovel in the way he held it.

Fourth. It was error to permit the witness, Joseph G. Moore, against defendant's objection, to answer the question propounded to him wherein he was asked whether it would be a difficult piece of work to fix on the end of a hand car a place for brooms to be held, and to describe how brooms might be fixed to a hand car.

Fifth. It was error for the court to sustain plaintiff's objection to the question propounded to the witness, Jerry Artery, wherein he was asked whether the statement contained in the written statement marked Exhibit "A," "that at the time Jim got hurt they were running at from four and one-half to five miles an hour, certainly not to exceed five miles," was correct.

Sixth. It was error for the court to sustain plaintiff's objection to the question propounded to the witness, Jerry Artery, wherein he was asked whether he had not previously stated that six men on a hand car have plenty of room, and that they often had eight and ten men on a hand car of the same size as that from which James Artery fell.

174 Seventh. It was error for the court to sustain plaintiff's objection to the question propounded to the witness, Jerry Artery, wherein he was asked whether he had not previously stated that he, Jerry, was a larger man than Jim, his brother; that his legs are a great deal longer than Jim's, and that he never had any trouble in keeping his feet up when he sat on the front of the car.

Eighth. It was error for the court to sustain plaintiff's objection to the question propounded to the witness, Jerry Artery, wherein he was asked whether he had not previously stated that if a man in holding a shovel on the rail and he is sitting on the front of a hand car there is no way for him to get hurt unless he forgets himself and lets his feet drop down.

Ninth. It was error for the court to sustain plaintiff's objection to the question propounded to the witness, Jerry Artery, wherein he was asked whether he had not previously stated that the hand car was in good condition; that nothing was broken about it anyway, and that it was an ordinary car, of full size.

Tenth. It was error for the court to sustain plaintiff's objection to the question propounded to the witness, Jerry Artery,

175 wherein he was asked whether he had not previously stated that he remembered distinctly of the foreman cautioning the men to keep their feet up and to be careful.

Eleventh. It was error for the court to sustain plaintiff's objection to the question propounded to the witness, Jerry Artery, wherein he was asked whether he had not previously stated that he was watching Kennedy, because he was afraid Kennedy would get hurt, as he, the witness, didn't think Kennedy had ever held a shovel before.

Twelfth. It was error for the court to overrule defendant's objection to the question propounded to the witness, Jerry Artery, and to permit him to answer the same, wherein he was asked whether from the time his brother was hurt up to the time of the trial he ever saw Herreman when Herreman didn't want him, the witness, to make some kind of a statement of the subject of the manner of the injury to the brother of witness.

Thirteenth. It was error for the court to sustain plaintiff's objection to the question propounded to the witness O'Neil wherein he was asked whether he had previously stated that it was cus-

176 tomary for some of the men to sit on the car in the winter, when it was necessary to throw off the snow.

Fourteenth. It was error to permit the witness O'Neil to testify as to the manner in which the car was moved from the place of the accident after the accident had occurred.

Fifteenth. It was error for the court to rule out Exhibit "A," being statement of March 23rd, 1886.

Sixteenth. It was error for the court to rule out Exhibit "B," being statement of Sept. first, 1886.

Seventeenth. It was error for the court to rule out Exhibit "C," being statement September first, 1886.

Eighteenth. It was error for the court to refuse to permit to be read to the jury the different portions of Exhibit "C" set out in the bill of exceptions.

Nineteenth. It was error for the court to overrule defendant's motion made at the close of the testimony on both sides and asking for an instruction to the jury directing a verdict for the defendant.

Twentieth. The court erred in refusing to give the several instructions, and each of them asked by defendant and numbered as follows to wit, one, two, three, four, five, six, seven, eight,
177 nine, ten, eleven, twelve, thirteen, fourteen, and fifteen.

Twenty-first. The court erred in stating to the jury that the illustration given by one of defendant's counsel of a conductor ordering a brakeman to couple cars was not applicable, and in connection therewith that the order given to Artery was specific as to the manner in which the work should be done, when the evidence shows that the order was not specific, but left it to Artery to determine how he would execute it.

Twenty-second. The court erred in failing to definitely instruct the jury what constituted negligence in view of the issues made in the pleadings and the testimony in the case.

Wherefore and because of the said errors said defendant prays for a reversal of the judgment entered herein.

BURTON HANSEN &
N. J. KNIGHT,
Att'ys for Defendant.

[Endorsed:] James Artery *vs.* C., M. & St. Paul R'y Co. Assignment of errors. Filed Sept. 24, 1888. A. J. Van Duzee, clerk.

178 In the Circuit Court of the United States for the Northern District of Iowa.

I, A. J. Van Duzee, clerk of said court for said district, do hereby certify that the foregoing transcript contains a full, true, and complete copy of the assignment of errors in a certain cause disposed of in said court, wherein James Artery is plaintiff and Chicago, Milwaukee & St. Paul Railroad Company is defendant, as full, true, and complete as the original of the same now remains on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, in Dubuque, in said district, this 24th day of Sept'r, A. D. 1888.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa.

179 [Endorsed:] Sup. Court U. S. 1888, Oct'r term. No. 679. The Chicago, Milwaukee & St. Paul Railway Co., Pl'ff in error, *vs.* James Artery. Assignment of errors. [Stamped:] Office Supreme Court U. S. Filed Sep. 27, 1888. James H. McKenney, clerk.

Endorsed on cover: N. Iowa C. C. U. S. No. 679. The Chicago Milwaukee and St. Paul Railway Company, plaintiff in error, *vs.* James Artery. Filed August 30, 1887.

FILED
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JAMES H. McKENNEY

Supreme Court of the United States.

No. 91.—October Term, 1890.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Plaintiff in Error,

vs.

JAMES ARTERY, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF NORTHERN DISTRICT OF IOWA.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

JOHN W. CARY,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM.

CHICAGO, MILWAUKEE & ST. PAUL,
RAILWAY COMPANY,
Plaintiff in Error,
vs.
JAMES ARTERY,
Defendant in Error.

No. 91.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action by a section man to recover for an injury received while returning from his work to his home, by being thrown from a hand-car and run over by it.

The plaintiff had been for several years employed by the defendant as a section hand on its road. On the 5th day of March, 1883, the section gang, consisting of a foreman and five men, of which the plaintiff was one, were engaged upon the road about four or five miles north of the place were they resided. They quit work at about five o'clock, and placed their hand-car on the track with their tools, to return home for the night. A light snow had been falling during the afternoon and the track was covered from a quarter to a half an inch deep. They

found it impracticable to pump the car, on account of the snow, and after pushing it for some distance two of the men took their shovels and seated themselves on the front of the car to scrape the snow from the track.

The plaintiff seated himself on one side and a man by the name of Kennedy on the opposite side, and held the shovels, and in that way they were enabled to propel the car.

After running about a mile, Kennedy's shovel caught something and was thrown from his hands, and the car was stopped to secure it.

They then proceeded for a mile or two farther, when the plaintiff, either from his feet or his shovel catching, was thrown in front of the car and it ran over him and he received very serious injury.

The plaintiff's complaint, as finally amended, (Record, pp. 3, 4 and 8), alleged:

1st. That the hand-car was overloaded.

2d. That it was running on the time of a train that was soon to follow.

3d. That he was ordered by the foreman to seat himself and hold the shovel.

4th. That the car was not furnished with any appliances for pushing the snow off the track.

5th. That it had no proper brake.

6th. That there was no foot-rest in front of the car to rest his feet upon.

7th. That the car was run at an unreasonable rate of speed.

8th. That the cattle-guard was improperly built, and some of the ribbons on it were above the top of the track, and that "by all of these circumstances he was thrown under said hand-car, all by the want of care on the part of the said defendant." (Record, p. 9.)

The case was twice tried. On the first trial the jury disagreed. On the second a verdict was rendered for the plaintiff.

I.

There was no negligence on the part of the defendant which caused or tended to produce this injury.

First. The company was not running the hand-car. It was furnished to the section men by the company for use, on which they were to transport themselves and tools to and from their work, as all other tools and machinery were furnished. They, the section men, were the only parties engaged in operating or using it; they managed it in their own way and for their own convenience.

The hand-car was furnished by the company in the same way and manner, and for the same purpose, that it might have furnished a span of horses or wagon to the section men to transport them to and from their work. The company did not operate the hand-car in the one case any more than it would have operated the horse and wagon in the other, and it could not be chargeable with negligence causing an injury, in operating one any more than the other. It might be possible that if an improper team or wagon was furnished, and an injury resulted in consequence, the company might be chargeable with negligence; so if the car was an improper or defective one, and an injury occurred from such impropriety or defect, the company might be held liable the same as it would be for furnishing unfit or defective tools of any other description, but it could not be charged with liability for any improper or careless act of the section men themselves in using such tools or machinery, and the company could not be charged for such improper or careless use of the tools or machinery furnished, because it had furnished a hand-car instead of a horse and lumber wagon.

The employer, whether a company or an individual, could not be held liable in such a case. If the injury was the result of negligence, either of the plaintiff or a co-employe, or an inevitable accident, the company would not be charged with liability for it.

The common law rule of liability for injuries received through the negligence of a co-employe is in full force in the State of Iowa, except as modified by statute, which will be noticed later.

Sullivan *vs.* R. R. Co., 11 Iowa, 421.

The plaintiff's complaint or petition, as it is called, alleges certain specific act of negligence, which it charges renders the company liable for the injury to the plaintiff.

Some of these specifications are of acts which, if proved, might render the company liable. Others are only negligences of a co-employe, for which the company would not be liable.

Of the first class are the following:

(1) That said hand-car was too small, and that it was overcrowded.

(2) That it was not provided with appliances for removing snow from the track.

(3) That it had no proper brake.

(4) That it had no foot-rests at the forward end of the car upon which plaintiff could rest his feet.

(5) That the cattle-guard was made of three-cornered pieces of wood, and placed negligently and wronfully on top of the ties across the track, instead of lengthwise, and some of which were above the rail, which was unknown to the plaintiff.

If these allegations, or some of them, had been proven, they might operate to charge the company with negligence which would render it liable for the injury received

by the plaintiff, provided it was the duty of the company to have furnished the appliances charged as wanting, but none of them that were material for that purpose were sustained by the proof, but, on the contrary, were in fact totally disproved, as shown by the Record.

(1) The first allegation as to the size and character of the hand-car.

The car was of the usual size, was not overloaded, and was a suitable and proper car for the purpose.

A section gang usually consists of five or six persons, sometimes one or two less, and frequently one or two more, but the ordinary gang is five or six.

It is the uniform practice on all roads to furnish to such a gang one hand-car for the purpose of transporting themselves and tools over the section in their charge.

This gang consisted of six persons, the foreman and five men.

The car furnished in this case was the standard hand-car of the company, and of the ordinary size, and was in good condition. It was amply sufficient in size for the section gang, and as appears from the testimony, even eight or ten could and did ride upon it when necessary. The plaintiff himself testifies that it was a new car with the platform about half a foot shorter in length than the one used the previous year. (Record, p. 15.)

Jerry Artery, the plaintiff's brother, thinks the old car a little longer than this one; is not certain. (Record, p. 21.)

He afterwards testifies: "It was the Milwaukee's standard hand-car." (Record, p. 39.) Kennedy says: "It was the standard car; the usual car." (Record, p. 34.) Rellihan, the foreman, testifies: "We were using a good car, as good as the average; good size, standard gauge." (Record, p. 37.) Charles Carney, one of the roadmasters of the Illinois Central Railroad, says: "Platforms of

hand-cars cannot be wider than the usual standard width, as it cannot extend beyond the wheels." He further says that the Milwaukee standard car is the same size as the Illinois Central car. (Record, p. 45.)

This is all the proof given upon the subject of the size and character of the car, and conclusively shows that it was an ordinary standard car of the company and in good condition.

There was no proof whatever that the car was overloaded.

The load consisted of the six section men. The only testimony in regard to this question is Rellihan's and he says: "I have carried as many as 8 or 10 men on this car." (Record, p. 37.)

(2) The second allegation of negligence in the complaint is that the car was not provided with appliances for removing snow from the track. There is no proof whatever that it was usual or customary for the company to fix any appliances upon their cars for that purpose or that they ever did it. That no company is in the habit of furnishing cars to its section men with any appliances for pushing snow from the track.

It was in proof that the section men sometimes themselves temporarily affixed to their hand-car old brooms, by nailing them to the side of the car, or by placing a scantling across the front of the car and boring holes in it through which a broom-handle was forced and fastened so as to hold a broom over the track, and that such brooms were sometimes used for the purpose of clearing the track from a light, dry snow, but were of no use for clearing it when the snow was damp or heavy; but all the testimony shows that all such contrivances were in all cases temporary matters arranged by the section men themselves, and were taken off and put on to the hand-

cars at their pleasure, but were never made a permanent appliance of the car and never furnished by the company. (Record, pages 17, 21, 24, 25, 34, 41 and 48.)

Jerry Artery, the plaintiff's brother, testified that such appliance had been fixed and used on this shortly prior to the accident, but that they had been taken off by the section men before the accident, probably because they supposed they would have no more snow. (Record, pp. 21, 24 and 25.)

(3) It is alleged that the car had no proper brake.

There was not one word of proof to sustain that allegation. Nothing of the kind can be found in the record, and the testimony of Jerry Artery shows that after the accident occurred he broke the brake with a spike mall, and there is no testimony whatever to show that the car was not fitted with a proper and sufficient brake.

(4) It is charged that the car had no foot-rests in front on which plaintiff's feet could rest.

This is admitted, but there is no proof that such rests were ever put on a hand-car by any company or at any time. All of the witnesses testified that in all their experience in railroading, (some of them extending over thirty years), they had never seen or heard of a hand-car so arranged with foot-rests.

It was not, therefore, the duty of the company so to equip this car, and it was not negligent in that respect.

(5) The complaint also alleged that the cattle-guard was made of three-cornered pieces of wood, placed negligently and wrongfully on top of the ties across the track, instead of lengthwise, and that some of them were above or higher than the ball of the rail, but the plaintiff was not aware of it.

There was no proof whatever that the cattle-guard was

negligently or improperly constructed. The fault charged in the complaint was that the three-cornered pieces of wood called ribbons, which were placed on the ties to prevent animals from crossing, should have been placed lengthwise of the track across the ties, instead of lengthwise of the ties across the track.

Not one word of proof was introduced to sustain this allegation, but, on the contrary, it was proved that the cattle-guard was properly constructed according to the plans of the company, and in the usual and approved manner. (Record, p. 39.)

These ribbons were intended to be only ¼ of an inch lower than the ball of the rail. There is no proof that they were higher than they should have been, or that they were above the rail, or that they were in any manner out of place.

Neither is there any proof that they caused the accident.

One of the witnesses stated that the frost would sometimes draw the nails by which they were fastened, so as to allow them to rise slightly above their proper position, but whether that had taken place or not in this case none of the witnesses testified.

There was no proof that the cattle-guard or the ribbons thereon were in any respect out of order.

This plaintiff was one of the section crew employed specially by the company to keep this six or seven miles of the road in order and repair, and it was the duty, not only of the foreman, but of each and every man of his crew, to look out, watch and examine for any and all obstructions of the track and discover if any of it on their section was out of order, and if so, to repair it, or if necessary report it to the foreman.

Is it competent for any one of this crew to charge the

company with negligence on account of any defect of the track under their charge, without first showing that they had discovered it and reported it to the proper authority? Should any of the section gang be allowed to recover against the company for negligence in not keeping the track under their charge in proper repair, when they themselves had not discovered that it was not in proper order?

Such negligence, if it existed, was the negligence of this very gang of section men, and it was their fault that it was not discovered and repaired or reported to the proper department.

These men should not be allowed to charge laches to the company when it was their duty to discover and repair or report the defect complained of. If they are injured in consequence of allowing their section to be out of order it is their own negligence that causes the injury and they are not entitled to charge the company with liability therefor.

The foregoing are the only specifications of the complaint for which the company could have been held liable, if sustained by the proofs, but the record shows not only that no one of these charges was sustained, but that there was no proof whatever tending to sustain either of them. There was no testimony whatever to submit to the jury on any of these charges.

The complaint also specifies as acts of negligence the following:

(1) That the hand-car was running on the time of a train, and that it should have waited until the train had passed before starting.

(2) That it was run and propelled at an unreasonable and unnecessarily fast and dangerous rate of speed.

(3) That the foreman directed that two of the men

should take their shovels and seat themselves on the front of the car and hold the shovels so as to clean off the snow, after it was found that they could not propel the car by the levers.

First. As to the first of the above allegations, it is admitted that a freight train followed said hand-car, but how soon it arrived at their place of starting, after the hand-car left, does not appear. It appears that the section crew were keeping watch of that train, and had no difficulty in keeping out of the way of it. They were not injured by it, nor in consequence of running ahead of it instead of waiting until it had passed. Besides, some six different roadmasters from other roads testified that it is not customary for hand-cars to wait for freight trains to pass before starting on the track; that they go when they are ready and trust to keeping out of the way of trains. (Rec., pp. 44, 46, 47.)

Second. It is charged in the complaint that the car was run at an unreasonable and dangerous rate of speed.

The plaintiff in his testimony says: "At the time of the accident the car was going over seven miles an hour." (Rec., p. 12.)

Jerry Artery thinks they were running between seven and eight miles an hour. (Rec., p. 19.) O'Neal says they were running seven or seven and one-half, maybe eight miles. (Rec., p. 28.) He further says: "That they could run six and ten miles an hour. The usual and ordinary speed at which we ran it up and down the road was about seven or eight miles."

Kennedy thinks they were running about five miles an hour at the time of the accident. (Rec., 33, 34, 35.) Rellihan says about five miles. (Rec. p. 36.)

It therefore appears that according to the plaintiff, his brother and O'Neal, they were running between seven

and eight miles an hour at the time of the accident, and that, they testified, was about the usual speed at which they ran the car generally.

Kennedy and Rellihan say they were running about five miles an hour. The plaintiff's testimony shows that they were running only about the usual rate of speed at which the car was run generally.

The plaintiff's own proof disproves the charge in the complaint that said car "was run and propelled at an unreasonable and unnecessarily fast and dangerous rate of speed."

Third. It is true that two of the men were directed to seat themselves on the front of the car and hold their shovels so as to clean the snow from the track, and that plaintiff and Kennedy seated themselves on the front of the car for that purpose.

The giving of this order by the foreman was not negligence on his part, but was a proper order under the circumstances, and the course pursued by him was the usual and customary one pursued under such circumstances. There is no testimony that such was not the usual and customary way of clearing the track in such cases, but all the testimony on the subject was to the effect that it was the usual and customary method pursued by section men on all roads troubled with snow. (Rec., pp. 34, 38, 41, 44, 46, 47, 48.)

There were seven witnesses who testified to this custom or practice, and that it was the usual way of clearing the track so that the hand-car could be propelled under such circumstances.

Six of these witnesses were roadmasters who had spent their lives in the business, several of them having had an experience of from 20 to 30 years, and none of them considered it a dangerous practice, or had ever heard of an

accident resulting from it until this one. There was no proof to the contrary whatever. (Bryant admr. *vs.* Railroad, 66 Ia., 305.)

We insist, therefore, that it was clearly and conclusively shown that the foreman was not guilty of negligence or a want of care in directing the plaintiff and Kennedy to seat themselves in the manner they were seated and hold the shovels in the way indicated, but that said order was the usual and customary order to give under such circumstances, and which said foreman might properly give, and that there was no evidence to the contrary before the Court.

The action of the foreman in starting his car before the train, and the speed at which it was run, and his order in regard to holding the shovels, were all acts and directions of a co-employe of the plaintiff, and if negligent, and injury resulted therefrom, the company is not responsible therefor.

The section foreman and the men under him are co-employes.

This has been frequently held in the State of Iowa, and is the general rule upon the subject, and it is well settled that for an injury occasioned by the negligence of a co-employe, no recovery can be had against the principal.

Peterson *vs.* Whitebreast Ins. Co., 50 Iowa, 673.
Pyne *vs.* R. R. Co., 54 Iowa, 223.
Troughear *vs.* Coal Co., 62 Iowa, 576.
Foley *vs.* R. R. Co., 64 Iowa, 644–50.
Wilson *vs.* Redstone Quarry Co., 77 Iowa, 429–32.

The law in Iowa upon this subject is well settled, and has frequently been declared by its Supreme Court, and the only exception thereto in that State is under its

statute as to all cases arising from injuries resulting from the operation of a railroad, and this case is not within the statute as construed by the Court of that State.

II.

This is not a case within the provisions of the statute of Iowa relating to injuries resulting from negligence of co-employes connected with the use or operation of any railway on or about which they shall be employed.

That statute is Section 1307 of the Iowa Code of 1873, now known as Section 2002 of the Revised Code of 1888, and is as follows:

> "Every corporation operating a ~~railroad~~ railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use ~~or~~ and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The construction of this statute has been settled by repeated decisions of the Supreme Court of Iowa, and as construed by that Court, does not include or cover this case.

Those decisions, so far as they change the law relative to employes, are to the effect *that only employes engaged in operating and moving trains, and who are injured by them, and those injured while in the discharge of their duty, by trains used in operating the railway, are within said statute.*

In Foley, *vs.* R. R. Co., 64 Iowa, 644, (see p. 649), the Court say:

> "With the exception of Deppe's case, all the actions in which this Court has determined that railroad

companies are liable in this class of cases, are those where the injury was received by the movement of cars or engines upon the track."

Deppe's case was decided prior to the adoption of the present statute, under the statute of 1862. The statute of 1862, Sec. 7, Chap. 169, did not contain the limitation clause of the present statute and was as follows:

"Every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employes of the corporation to any person sustaining such damage."

While this statute was in force, Deppe was injured when employed on a gravel train, by the falling of a bank of dirt, and not by the movement of a train. In the case of Malone *vs.* R'y Co., hereinafter cited, the Court refer to this decision and point out a difference between the statutes and say: "But the subsequent legislation has established a new rule as to the class of acts for which the companies are liable."

Under the present statute no action has ever been maintained, except for accidents caused by or on moving trains.

Actions have been repeatedly brought by shop men, section men, station employes, construction men and others for injuries sustained otherwise than by moving trains, but in every case the Court have held that there could be no recovery under this statute except where the injury was caused on or by the movement of trains in the use and operation of the road, as will appear from an examination of the reported cases.

Stroble, *vs.* Ry. Co., 70 Iowa, 555, (see page 560,) was a case where an employe was engaged in hoisting coal at

the station, for the purpose of supplying the locomotives, and was injured by the falling of the stairs leading from the lower to the upper floor of the station.

Beck, J., in delivering the opinion of the Court, states the rule of constructing as follows: (Page, 560).

> "This negligence, to render the corporation liable, must be of an employe and affect a co-employe who is in some manner performing work for the purpose of moving a train, as loading or unloading it, superintending, directing or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from the train, is not connected with its movement. The statute, it will be observed, holds the corporation liable for the negligence of a co-employe which is in any manner connected with the use and operation of any railway: What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole use. What is the operation of a railway? They can be operated in no other way than by the movement of trains."

In Luce, *vs.* Ry. Co., 67 Iowa, 75, the plaintiff was injured by the negligence of a co-employe while engaged in hoisting coal for the purpose of filling a car. The Court say:

> "The danger arising from the use of the crane does not appear to have been greater or less by the fact that it was used in loading a railroad car. Nor does it appear that the plaintiff, while engaged in his duties, was exposed to any danger from the operation of the road."

In Malone *vs.* Ry. Co., 65 Iowa, 417, the injury of the plaintiff was by the negligence of a co-employe. He was employed as a wiper. His duties were to clean the engines when they were brought in off the road; to open the doors of the engine-house to admit the passage of engines into and out of the house, and close the same after

the engines had passed; to turn the turntable; to shovel the snow from the turntable and tracks leading from the engine-house, into a dumpy or hand-car, and move the same to some convenient and accessible place on the main track over which the trains passed, and there shovel the snow from the dumpy.

While so employed after the engine had passed into the engine-house, in attempting to close the door they found that ice had accumulated so as to obstruct the door, and one of the employes, for the purpose of overcoming the obstruction, took a crowbar and raised the door, and in doing so, lifted it off the hinges, and it fell and injured the plaintiff. This case was twice before the Court, first in 61 Iowa, 326, when a judgment for the plaintiff was reversed, and afterwards as reported in 65 Iowa, and the Court say, (p. 419):

> "The particular duty in which the plaintiff and his co-employe, whose negligence caused the injury, were engaged at the time of the accident did not pertain to the business of operating the railroad. And second, neither that particular duty, nor any other which the nature of his employment required him to perform, as shown by the evidence, brought him within the class of employes who were engaged in operating the railroad. The construction which has been put, by the adjudications of this Court, upon the statute under which the liability of railroad companies to employes for injuries caused by the negligence of co-employes arises, is that it affords a remedy only to such employes as are employed at the time of receiving the injury, in the business of operating the railroad." The Court further say, in speaking of the Deppe case, decided under the act of 1862: "The liability created by the act of 1862 is expressed in general terms. By it the company is made liable for all damages sustained by any person in consequence of any mismanagement or neglect of any of its employes. The

> acts or omissions of its employes for which it would be liable would be such, of course, as the employes should commit in the course of their employment; but its liability is not otherwise limited by the act; while under the present statute, its liability is limited to such damages as are occasioned by the negligence or mismanagement or willful wrongs of its employes, which are connected with the use and operation of the railroad on or about which they are employed." The Court further say: "But the subsequent legislation has established a new rule as to the class of acts for which the companies are liable. So that, to entitle an employe now to recover against the company for injuries which he has sustained in consequence of the negligence or mismanagement or willfulness of a co-employe, he must show (1) that he belonged to the class of employes to whom the statute affords a remedy; and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given. We think it very clear that the plaintiff has failed to establish the latter fact."

In Potter *vs.* R'y Co., 46 Iowa, 399, the plaintiff was employed in defendant's machine shop, and was knocked down and greatly injured by a locomotive drive wheel, which he and other employes were moving by hand. The Court say:

> "In the present case, the plaintiff was in no manner connected with the operation of a railroad; and whether the defendant is liable or not, must depend not on the statute, but on the principles of the common law as held to exist in this State. The fact that the shop is owned and controlled by a railroad corporation is entirely immaterial. The liability of the defendant must be measured by the same rules as if the shop was owned and conducted by a natural person. The common law on this subject was declared in Sullivan *vs.* M. & M. R. R. Co., 11 Iowa, 421, to be that the employer was not liable for injuries sustained by an employe through the negligence of a co-employe."

In Smith *vs.* R. R. Co., 59 Iowa, 73, the plaintiff was a section hand, and while engaged in loading car timbers at a switch of the railroad was, without his fault, injured through the negligence of a co-employe. The Court say:

> "It is not shown that his employment or the special service in which he was engaged at the time, required him to go upon the cars, ride upon them, or in any way to assist in the operation of the trains upon the road. * * * To entitle an employe of a railroad company to recover for personal injuries inflicted through the negligence of a co employe, it must be shown that his employment was connected with the operation of a railroad."

In Pierce *vs.* R'y Co., 73 Iowa, 140, a shop employe was directed to remove some screens from a passenger train, and while he was on a ladder placed against one of the cars, the train was moved backward, causing the ladder to fall, by which he was injured.

The Court, speaking of the statute, said:

> "It provides for such liability when the injury is sustained by the negligence of co-employes, and the 'negligence is in any manner connected with the use and operation of any railway on or about which they shall be employed.' * * * The negligence, in the language of the statute, was connected with the use and operation of the railway, and it was the negligence of some one employed on it. * * * The defendant's position is that the plaintiff cannot recover because he was not employed in the operation of the road. But, in our opinion, that is not material. He was injured by the operation of the road, and, as the evidence tended to show, by the negligence of one or more who were charged with responsibility with respect to the movement of the train."

In Pyne *vs.* R. R. Co., 54 Iowa, 223 (see page 227), the Court say:

"It will be observed that there is language in some of the cases which seems to imply that the statute embraces only those who are engaged in the actual operation of a railroad, in running the trains, but that the right of action is not thus limited is apparent. Trackmen, switch-tenders and others whose duty requires them to be on the track are more or less exposed to the hazards of the business of railroading, and such employes, when injured *by the use or operation of the road*, and by the negligence of co-employes, are as plainly within the provisions of the statute as those whose duty requires them to assist in the running of trains. We think the proper test in determining the question is, Does the duty of the employe require him to perform service which exposes him to hazard peculiar to the business of using and operating a railroad? If it does, and if, while in the line of his duty, he, by the negligence of a co-employe, receives an injury from a passing train or from other appliances used in the use and operation of the road, he may recover."

In Matson *vs.* R. R. Co., 68 Iowa, 22, the complaint stated that plaintiff was a member of a construction gang, whose duties required him to go upon the cars and trains, and ride upon the same and work about them. That he was engaged with others in placing large stones under the ends of the ties on defendant's main track, and while so engaged a co-employe hurled a heavy stone without warning to plaintiff, in such manner that it fell upon him and injured him. There was demurrer to the complaint. The Court said:

"It will be observed from the averments of the petition that the injury complained of was not caused by the movement of the train or by the operation of the railroad. The plaintiff and his fellow servants were not upon or about any train, nor any moving cars, and were not using any appliances in any manner connected with the use and opera-

tion of the railway. They were engaged in repairing or improving the railroad track;" and the demurrer was sustained.

In the case of Schroeder *vs.* R. R. Co., 4 Iowa, 344, the plaintiff was employed in removing the timbers of the old Rock Island bridge, which were loaded on to a car and transported for a short distance and there deposited. He was injured by the timbers falling off the car while in transportation. He obtained a judgement and it was reversed by the Supreme Court as it did not appear that he was required by his employment to ride on the timbers to where they were unloaded. The case was subsequently tried and it was made to appear that the plaintiff was engaged in assisting to remove the timbers of the Rock Island bridge and loading them on a train, and was required to ride on the train to the place of unloading the same, and while so riding on the train, was injured by the timbers falling off. The Court held that he was engaged in the operation of the road and was entitled to recover, clearly showing the intention to hold the statute applicable, in case of employes, to those injured by the operation and movement of trains only. (47 Iowa, 375.)

In Deppe *vs.* R. R. Co., 36 Iowa, 52, plaintiff was one of a gang of men engaged on a construction train removing earth from a bank to make an embankment. He was injured while engaged in shoveling, by the falling of the bank, and not by the moving of a train; but this was the case decided under the former statute which was not limited to injuries caused by the use or operation of the railroad.

In Nelson *vs.* R. R. Co., 73 Iowa, 576, the plaintiff was injured while working with a ditching machine which was operated on a flat car by moving the train, and the Court held that he was entitled to recover on the ground that the movement of the train was a necessary part of

the work in which he was engaged, and he was therefore injured in the operation of the road.

In Rayburn *vs.* R. R. Co., 74 Iowa, 637, plaintiff was a section hand and was ordered to get on to a moving train to assist in unloading the same, and was injured by the train in attempting to do so, and the Court held that he was entitled to recover.

In the case of Foley *vs.* R. R. Co., 64 Iowa, 644, the plaintiff was a car-repairer and was engaged in repairing cars on the track in the yard at Des Moines. One end of the car was pried up with jack-screws, and while he was under it making the repairs, the car moved forward and tilted the jack-screws and one of the wheels ran over the plaintiff's foot. It was alleged that the car wheels were not blocked, and that at the time of the injury, an employe was using a bar or lever upon the part of the track which the plaintiff was repairing.

The Court held that he was not entitled to recover under the statute.

The case of Fransden *vs.* R. R. Co., 36 Iowa, 372, was a section man who was injured by a train, and the Court held that he could recover.

This statement of the decisions of the Supreme Court construing this statute clearly shows that it includes only cases of injury caused by the "use and operation of any railway," and it further shows that "use and operation of any railway" as used in that statute, means *the movement of trains.*

Judge Beck, in delivering the opinion of the Court in the case of Stroble, *vs.* Ry. Co., (*supra*) says: "What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole use. What is the operation of a railway? They can be operated in no other way than by the movement of trains."

The running of a hand-car by section men is not the movement of trains. All the cases hold that the injury must be caused by the operation of the railroad, and as explained by the Court, the words "use and operation," as used in the statute, are confined to the movement of trains; hence the operation of the railroad consists only in the movement of trains for the purposes of this statute as construed by the Court.

It was the evident purpose of the Legislature, in passing this statute, to protect the employes of the railroad from the negligence of the co-employes, from the extraordinary dangers which attend the handling and movement of trains of cars; and that has been the construction given it by the Iowa Supreme Court in its uniform course of decision upon the subject.

As the Court say in the case of Foley, page 647: "The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited it is constitutional. When extended further it becomes unconstitutional."

The Court in its decisions has not confined it to trainmen alone, but has given all the different classes of railroad employes the benefit of it whenever the injury resulted from a moving train, and denied its benefits to the same classes of employes when the injury was not caused by such movement.

In the case of Potter, in the 46th Iowa, and of Foley, in the 64th, shopmen, were held not within the statute, when injured, one in repairing a drive-wheel of a locomotive, and the other a car on the track, because not injured by a moving train; but in the case of Pierce, 73 Iowa, another shopman, was held within its provisions while removing screens from a passenger car which was moved while he was so engaged, causing his injury.

Smith, a section man, in the 59th Iowa, and Matson, a track repairer, in the 68th, were held not within its provisions; while Fransden, in the 36th, and Rayburn, in the 74th, section men were so included, because the first two were not, but the last two were injured by a moving train.

Schroeder, in the 47th, and Nelson, in the 73d, were held within the statute because injured by moving trains, but Malone, in the 65th, Stroble, in the 70th, and Luce, in 67th, were held not entitled to its benefit, because there was no train connected with their injuries.

The construction of this statute, as made by these decisions of the Supreme Court, clearly shows that the plaintiff in this case is not within its provisions, and that if the judgment is to be sustained, it must be under the common law and not by virtue of this statute.

No argument or authority is needed to establish the proposition that the construction of this statute by the Supreme Court of Iowa is binding upon this Court.

III.

The Court erred in its ruling excluding the testimony of the defendant in the examination of Jerry Artery. (*Rec., pp. 22, 23, 24.*)

The defendant produced a written statement which is attached as Exhibit A, (Rec., p. 66), purporting to be signed by Jerry Artery, and the witness said it was his signature.

Q. In the written statement which I have just shown you, you state as follows: "At the time Jim got hurt we were running four and one-half to five miles an hour, certainly not to exceed five miles." Is that statement correct?

(Objected to by plaintiff, objection sustained, defendant excepted.)

The question put to the witness had reference to a fact contained in a paper which the witness admitted he had signed.

It is precisely the same as though the witness had been asked that question without reference to the statement, that is, the same as though the defendant's counsel had asked the witness whether, at the time mentioned, he stated the fact quoted from the statement. It was asking the witness whether he did not, at that time, make such a statement. Independent of the paper produced, it was a proper question to put to him preparatory to calling witnesses to contradict him if he denied it, for the purpose of impeachment, and was certainly competent in that view, whether the written statement itself could or could not be introduced in evidence.

It was claimed in the complaint that the car was running at an unusual rate of speed. The witness had testified that it was running at the rate of 7 or 7½ miles an hour. The defendant's counsel put this question to him for the purpose of showing that right away after the accident he stated that the speed was only 4½ or 5 miles an hour. The object of putting the question was to discredit the witness' testimony on his direct examination, first, by showing that he made statements different from what he then testified to; and second, if he denied making such statements, to call witnesses to contradict him.

The question was therefore proper, and should have been allowed.

The defendant's counsel then put to the witness eight different questions, as follows:

Q. On the occasion I have referred to, did you make this statement: "Six men on the hand-car have plenty of

room; we often have had 8 and 10 men on a hand-car of the same size?"

(Objected to by plaintiff, objection sustained, exception by defendant.)

Q. Did you, on the occasion I have referred to, at Harper's Ferry, say as follows: "I am a larger man than Jim ever was, and my legs are a great deal longer. I have never had any trouble in keeping my feet up when I sat on the front of the car?"

(Objected to by plaintiff, objection sustained, exception by defendant.)

Q. On the occasion referred to, did you state as follows: "If a man is holding a shovel on the rail, and he is sitting on the front of a hand-car, there is no way for him to get hurt, unless he forgets himself and lets his feet drop down?"

(Objected to by plaintiff, objection sustained, exception by defendant.)

Q. On the occasion referred to, did you state as follows: "The hand-car was in good condition, nothing broken about it in any way; it was an ordinary car, full size?"

(Objected to by plaintiff, objection sustained, exception by defendant.)

Q. Did you, on that occasion referred to, state as follows: "I am foreman at present on Section No. 20. The top of the ribbons on the ties of the cattle-guard was about level with the ball of the rail?"

A. Well, sir, I don't remember whether I did or not say that.

Q. If you did say that, was it the truth or not?

(Objected to by plaintiff, objection sustained, exception by defendant.) (Record, p. 24.)

Q. Did you, on the occassion referred to, on Septem-

ber 1st, 1886, in the presence of Buell and Herriman, at Harper's Ferry, state as follows: "I remember distinctly of the foreman's cautioning the men to keep their feet up and be careful?"

(Objected to by plaintiff, objection sustained, exception by plaintiff.)

Q. On the first of September, 1886, at Harper's Ferry, in the presence of Mr. Buell and Mr. Harriman, did you make the following statement: "I was watching Kennedy because I was afraid he would get hurt, as I did not think he had ever held the shovel before?"

(Objected to by plaintiff, objection sustained, exception by defendant.) (Record, pp. 25 and 26.)

All of these questions called for the statements or declarations made by this witness at the time referred to, asking him if, at the time and place mentioned, he made such statements.

It was competent and proper for the defendant's counsel to put these questions to this witness—first, for the purpose, if he admitted making such statements, to discredit the testimony given on his direct examination; and second, if he denied making such statements, for the purpose of calling witnesses to contradict and thereby impeach his testimony.

These questions were entirely independent of the written statement. The defendant had a right to put them for the purpose of showing that the witness had made a statement of the facts different from what he testified to on the trial, and thus discredit him before the jury, and it was necessary to put these questions to him in order to lay the foundation for his impeachment by other witnesses in case of his denial of having made the statements.

It was, therefore, manifest error to exclude the testimony.

To the plaintiff's witness, John O'Neal, defendant's counsel, on cross-examination, put the following question:

Q. Did you tell Herriman on that occasion, as appears in this statement, that it was customary for some of the men to sit on the car, in the winter, when it was necessary to throw off the snow?

This question was also objected to by the plaintiff and excluded by the Court, and the defendant duly excepted.

Afterwards the defendant offered in evidence, for the purpose of impeaching the plaintiff's witnesses, statements made by Jerry Artery, Exhibits A and B, and Exhibit C, signed by John O'Neal, which were objected to by the plaintiff and the objection sustained by the Court, and the defendant excepted.

In the bill of exceptions, the Court states the grounds of his decision as follows: "That it appeared that the statements were not volunteered by the witness, but that the Company had sent its claim agent, after the happening of the accident, to examine the employes who were present at the time of the accident, in regard to the transaction. That the statements made by the witnessses were not taken down in full, but only a synopsis thereof, made by the agent, the correctness of which is questioned by the witnesses in some particulars, although such written statement was signed by the witness. That upon the trial of this case, these statements thus obtained were sought to be used, not alone as a means of impeaching the witness, but as evidence of the matters therein recited. That it is apparent to the Court, that whether so intended or not, these statements become a ready means of confusing and intimidating witnesses before the jury, and that if it be permitted to parties to thus procure written statements in advance from witnesses and then use the same in examining such witnesses, it will enable parties to shape and con-

trol the evidence in a cause by committing the witness to a particular statement, couched in the language, not of the witness, but of the person carrying on the examination. That this growing abuse can only be corrected by entirely excluding such statements thus procured from being admitted in evidence for any purpose. That if the party desires to impeach a witness by showing contradictory statements made by him, the person to whom, or in whose presence such alleged contradictory statements were made, should be called as a witness, so that opportunity might be afforded of placing before the jury the statements actually made by the witness sought to be impeached, and not a mere synopsis thereof, made by another person, and the accuracy of which, in some particulars, was challenged."

The defendant excepted to the decision.

A written statement signed by a party is better evidence of what it is claimed he has said on a previous occasion than oral testimony of witnesses who heard the statement at the time, and is equally admissible in evidence to prove his declaration as the oral testimony of witnesses present who heard it, and is more satisfactory as to the fact.

The statements offered in evidence were signed by the parties, and as they were presented to the parties signing them, there could be no objection to receiving them as evidence, as the witness was on the stand and at liberty to contradict or explain any statement contained therein, or to show that it was not his statement as made at the time.

The objections, therefore, stated by the Court were no reason for rejecting the papers offered, and they should have been received in evidence, subject to such explanation as the witness who had signed them could make in regard to them.

It was error to reject them.

IV.

The Court erred in refusing to give the special instructions asked by the defendant to the jury.

The defendant's counsel, at the close of the testimony, asked the Court to instruct the jury as follows:

First. "The Court instructs you that the testimony in this case wholly fails to make out a case of legal liability on the part of the defendant, and you are therefore directed to find a verdict for the defendant."

Which instruction the Court refused to give and the defendant duly excepted.

There was no evidence of negligence or want of care on the part of the defendant in this case.

It is the duty of the Court, when there is no evidence to sustain a verdict for the plaintiff, to take the case from the jury and direct a verdict for the defendant.

The question is not whether there is any, or a scintilla of evidence, but is there sufficient to sustain a verdict?

In Improvement Company *vs.* Munson, 14 Wall., 448, the Court say:

> "Formerly it was held that if there was what is called a scintilla of evidence in support of the case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

In Pleasants *vs.* Fant, 22 Wall., 120, Mr. Justice Miller, in delivering the opinion of the Court, says:

> "But, as was said by this Court in the case of the Improvement Company *vs.* Munson, recent decisions of high authority have established a more reason-

> able rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

These decisions were referred to in Commissioners, etc. *vs.* Clark, 94 U. S., as the settled rule of this Court.

The instruction asked was a proper one to have been given if there was no evidence which would sustain a verdict.

The question as to whether there was any such evidence in this case, has been already fully considered under the first and second points of this brief.

In order to entitle the plaintiff to recover in this action it was necessary to show that the defendant had been guilty of a want of care or negligence that caused the injury.

In the complaint certain acts or omissions of defendant were specifically alleged as the negligence which caused the plaintiff's injury, and in order to recover, it was necessary that these acts, or some of them, should have been proved, and that they were acts of negligence or want of care that caused the plaintiff's injury. This was not shown by the testimony.

No act or omission of defendant caused this accident. The section force were of the usual number, organized in the usual way. They were furnished with the usual and proper tools for their work, with a hand-car in good condition and of the standard size and quality, and with all equipments usually furnished by railroad companies for such cars.

There was no defect in the track or the road. The injury was not caused by a moving train, or any other

person, force or agency outside of said section gang. They were co-employes.

It does not appear that the injury was caused by the negligence of any co-employe, but if it was, the defendant was not chargeable with it. Hence there was no evidence to sustain the verdict for the plaintiff, and the Court erred in refusing the instruction asked.

The defendant then asked the Court to give the following instruction to the jury:

(2) "The Court instructs you that the undisputed testimony in this case shows that it was usual and customary to place section men on the front of a moving hand-car to hold shovels on the rails to remove snow that the hand-car might be propelled over the road, in the same way in which plaintiff, Artery, was placed on the car from which he fell and was injured, and you are, therefore, instructed that the foreman, Rellehan, was not guilty of negligence in so placing Artery, and that you cannot find the defendant guilty of negligence because Artery was so placed." (Record, pp. 51, 52.)

Which instruction the Court refused to give, and the defendant duly excepted.

The witness Kennedy, who was one of the parties holding the shovel at the time, says: "We have several times sat on the front of the car and held shovels to push the snow off the rails. I could not say whether it was customary and usual or not, but we have done it several times, on that section. I have done it a few times before this time, and seen other men do it." (Rec., p. 34.)

That it was and is the practice and the usual and customary way of clearing the track is proven by the testimony of Rellehan (Rec., 38), of Wright (Rec., 41), of Carney (Rec., 44), of Sullivan (Rec., 46), of McEnery (Rec., 47), and of Davis (Rec., 48).

There was no testimony to the contrary, and neither he or his witnesses pretended to deny it, or that it had been practiced on this section, as sworn to by Kennedy and Rellehan.

The instruction, therefore, should have been given as asked, and it was error to refuse it, as there was no evidence to the contrary.

The defendant also asked the Court to give the following instruction to the jury:

(3) "The Court instructs you that there is no proof before you that would warrant you in finding the defendant negligent because of the manner in which the cattle-guard was constructed or the way the ribbons were placed upon it." (Record, p. 52.)

There was not one word of evidence that the cattle-guard was improperly constructed or the ribbons improperly placed, or that it was out of order. The complaint alleged it, but there was no proof to sustain it. The Court not only refused to give this instruction, but in his general charge submitted the condition of the track to the jury as to whether the defendant was guilty of negligence. The refusal to charge as requested, and the charge given, had a manifest tendency to mislead the jury.

The instruction should have been given as asked, and its refusal was error.

The defendant also asked the Court to give the following instruction to the jury:

(4) "There is no proof before you that would warrant you in finding the defendant negligent because of the absence of foot-rests upon the hand-car." (Rec., p. 52.)

There was no proof that it is customary or usual to put foot-rests upon the ends of hand-cars. No proof that such rests were or had ever been affixed to a hand-car by any company, and all the witnesses who testified upon the

subject stated that they never saw and had never heard of such a fixture to a hand-car.

The want of such a rest was one of the grounds of negligence claimed in the plaintiff's complaint. It was, therefore, a matter in the case, and as the plaintiff had wholly failed to adduce any proof to sustain the allegation, it was proper to ask this instruction to the jury and it should have been given.

The failure to so instruct the jury left them at liberty to infer that the want of foot-rests might be a ground of negligence, and tended to mislead them.

The defendant also asked the Court to give the following instruction to the jury:

(5) "There is no proof before you that would warrant you in finding the defendant negligent because of the absence of appliances or brooms from this hand-car, at the time in question, to clear the snow from the rail."

This was also one of the claims of negligence stated in the plaintiff's complaint. The testimony was clear and uncontradicted that no such appliances were ever put on hand-cars furnished to section men by the company, but it was proved that the section men in some instances themselves affixed brooms temporarily to the hand-car by nailing them on to the side of it or placing a scantling on the hand-car in which holes were bored, through which a broom handle was thrust so that the broom would sweep the track, and that the section men were in the habit of putting them on and taking them off at their pleasure, and plaintiff's witness, Jerry Artery, testified that this section gang had so affixed them to this hand-car and used it with brooms so affixed shortly prior to this accident, and had themselves removed them, presumably because they did not anticipate a snow storm that would require their use. (Record, pp. 21, 24, 25, 34.)

All the testimony was to the effect that so far as brooms were used on hand-cars they were so affixed and used by the section men at their own discretion, and not by the direction of the company; and it was further proved that this was the customary practice, not only on defendant's road, but on all other roads where such appliances were used.

The defendant also asked the Court to give the following instruction to the jury:

(6) "There is no proof before you that would warrant you in finding the defendant negligent in furnishing the section crew an unsafe, unfit, or improper hand-car."

There was no proof that the hand-car was an unsafe, unfit, or improper hand-car, although such an allegation was made in the complaint. On the contrary the proof shows it to have been a standard car and in all respects in good order

The complaint alleges that it was defective, improperly equipped and too small, but there was not one word of proof to sustain this allegation, unless it be the testimony of the plaintiff that he thought it was six inches shorter than one that had been on the road the year previous; but that was no evidence to sustain the allegation of the complaint.

On the other hand, all of the witnesses, including Jerry Artery, testified that it was a standard car and in good condition, besides there is nothing in the case to show it otherwise, and the accident did not occur in consequence of the size or condition of, or any defect in the car.

The defendant also asked instructions Nos. 7 to 13 inclusive, (Rec. 52 and 53,) which were pertinent and proper instructions to have been given to the jury in the consideration of this case, all of which the Court refused to give, and to the refusal to give each and every one of the instructions so asked, the defendant duly excepted.

V.

The Court erroneously instructed the jury.

After refusing the said several instructions asked by the defendant, the Court proceeded to charge the jury, and his charge is found at length on pages 53 to 63 of the Record.

The defendant then and there duly excepted to portions of said charge as follows: Among other things the Court charged the jury:

> "The questions that are in dispute, gentlemen, are, in the first instance, as to whether or no the plaintiff has, by a fair preponderance of the evidence, satisfied you that this accident was due, in the first instance, to negligence upon the part of the defendant company. Now, then, gentlemen, it seems to me that this question turns upon this: Taking that track just as it in fact, was, as you find it was, under the evidence in this case—taking its condition as it then was, taking all the facts and circumstances surrounding the parties as they then were, and as they are shown by the evidence to have been; taking the car just as it was, just of the size it was, and just in the condition it was, without any brooms or other appliances upon it for the purpose of pushing off snow, was it, or was it not negligence upon the part of the section foreman to require the plaintiff and Kennedy, these two men, to place themselves upon the front of the car and hold shovels down on the rails, for the purpose of cleaning off the snow therefrom, and continue them in that position up to the time that the accident happened to the plaintiff in this case?

This charge in effect, assumes that there had been testimony given to the effect that the track was not in the proper condition and order. No such testimony was in the case.

It also assumes that testimony had been given which the jury might consider as to the character, condition and furnishing of the hand-car, and that they might find the

defendant guilty of negligence from the condition, size or fixtures of the car, when, in fact, no testimony whatever, had been given to sustain the allegations of the complaint that said car was of an improper size, improperly furnished, or any way in bad condition, but, on the contrary, it had been affirmatively shown that it was a standard car, in good condition, and with the proper appliances, by all the testimony in the case. It was, therefore, manifest error for the Court to submit those questions to the jury as matters for them to consider as to whether the company had or had not been guilty of negligence.

Second. The testimony of all the witnesses who tistified on the subject was that it was the customary and usual practice on all the railroads in the vicinity, some half a dozen in number, when occasion required, to have section men seated on the front of the car and hold shovels to clear the track of snow so that the hand-car could be operated. That such had been the practice of this particular section gang. That it was practiced upon the road of the defendant, the Illinois Central, the Chicago, St. Paul, Minneapolis & Omaha, the Burlington & Northern, and other roads whose roadmasters were present and testified to the manner of doing section work and of operating hand-cars under such circumstances, and there was not one word of testimony from any of the witnesses to disprove the custom and practice so proven. Hence there was no question to submit to the jury on the testimony as to the action of the foreman in placing Kennedy and the plaintiff on the car in the manner in which they were placed to do the work which they were doing

Third. The plaintiff and Rellehan, the foreman, were co-employes engaged in a common employment, and by the well settled law of this country and of the State of Iowa, the negligence or want of care of such foreman was not

the negligence or want of care of the company which would authorize the plaintiff to recover against the company for his act.

Fourth. The plaintiff was not injured by a moving train or the operation of the railroad, and was not, therefore, within the statute of the State of Iowa, allowing plaintiffs to recover for injuries of that nature, and the charge so excepted to was erroneous.

The defendant's counsel also excepted to that portion of said charge which reads as follows:

> "The duty and obligation is always present upon the company through the person who stands in its employ, as the foreman does in charge of men, as I have said, to exercise ordinary care to protect the men against unnecessary risk and hazard. The meaning of that, is that he must not himself unnecessarily subject them to a risk and hazard greater than the ordinary circumstances would demand of them in the performance of their duty to the railway company. Now, then, gentlemen, you will have to decide the question of whether placing the men in this way upon the front of this car, as I have said, subjected them to unnecessary risk and hazard to life and limb." (Record, pp. 63 and 64.)

There was no proof in the case upon which this charge could be based. The proof was clear and explicit that the foreman did only what was customary and usual to do, and there was no proof to the contrary.

The defendant's counsel also excepted to the following portion of said charge:

> "Therefore, gentlemen, as I have said, the question is, whether, taking into account the exact situation as it then was, whether or no you find, under the evidence, Rellehan, and through him the company, was guilty of negligence, the want of ordinary care, in requiring the plaintiff to place himself upon the front end of the car and hold the shovel there for the purpose of clearing the snow off the track and

continuing him in that position until the accident happened." (Record, p. 64.)

First. It was error to charge the jury that the act of Rellehan, a co-employe of the plaintiff, was or could be negligence of the company.

Second. The charge is erroneous in that it submits to the jury the question as to whether Rellehan was guilty of negligence, when there was no testimony whatever upon which such a finding could be based.

The defendant's counsel also excepted to the following portion of said charge:

> "The order requiring him to place himself upon the front of the car required him to remain there for a time, and the uncontradicted evidence shows he did remain upon the front of the car, holding this shovel, for a period of time. Now, then, the question is also whether the plaintiff by a fair preponderance of the evidence, has satisfied you that there was negligence on the part of Rellehan in continuing these parties—continuing the plaintiff, particularly—upon the front end of the car up to the time that the accident happened to Artery himself." (Record, p. 64.)

This instruction is erroneous in that it submits to the jury to find whether or not the plaintiff was continued in his position an unreasonable length of time, when there is no evidence whatever upon that subject upon which the jury could pass.

The defendant's counsel also excepted to the following portion of the charge:

> "It is for you to determine all the questions of fact, including the question whether or no the evidence satisfies you, under the instructions I have given you, whether the defendant company was guilty of negligence in that, through the direction of the foreman, the plaintiff was required to place himself upon the front end of the car and continue there, holding the shovel for the purpose of clearing the

snow off the track, up to the time that the accident happened to him." (Rec., p. 64.)

This instruction is erroneous, among other things, for the reason that it instructs the jury that the negligence of the foreman, a co-employe of the plaintiff, was the negligence of the company.

The defendant's counsel also excepted to the following portion of said charge:

"There is a difference between cases of this kind and a case in which the command is given to do some specific thing, but not in any specific manner. To use the illustration referred to by counsel in his argument—that is, a conductor may order a brakeman to go and couple a car. He does not direct him as to the mode in which he shall couple it; that is left to the brakeman. The brakeman may go in and do it in a careless manner; and if in doing it in a careless manner he suffers an injury he cannot turn around and say, 'I was commanded to go in and make that coupling.' That is part of his duty. The mere order to couple the car, ordinarily, would not show there was any negligence on the part of the conductor in giving such order; but if the command is to do some specific thing in a specific manner, then, as I have said, the first duty that is expected from the employe is obedience to that specific command—to do it in that specific manner; and, as I have already said, the employe who receives that order has a right to suppose that the person who gave it has exercised ordinary care in determining whether or no he should be required to do this specific thing in that specific manner; and, in the first place, therefore, they expect from these employes, under these circumstances, obedience to the order; but, as I have already said to you, notwithstanding that, if the danger and the risk is so apparent that it would be reckless of a man to expose himself to it, then it would be his duty, even under those circumstancee, for the employe to refuse to assume the risk and refuse to obey the order given to him." (Record, p. 65.)

This charge assumes that this plaintiff was directed to do an act in a specific manner, and that in fact the injury occurred in consequence of his pursuing that instruction, while in truth and in fact he was simple directed to take his seat upon the front of the car and hold his shovel on the rail so as to clean off the snow. No specific directions were given in regard to it or the manner in which he should sit, or in which he should hold his shovel. All the proof in the case shows that this was a customary and usual thing to do; as much so in operating a hand-car in the winter as it is for a brakeman to couple cars, and the direction in regard to the performance of this act was no more specific than is the direction of a conductor to a brakeman to couple cars.

The direction is to do it in the usual manner, and that was what the plaintiff was directed to do in this case, to perform a customary and usual duty on hand-cars in the customary and usual manner, or in other words, he was directed generally to do this act, the same as a brakeman is directed to couple or uncouple cars.

There was, therefore, no difference or distinction in this order from that of the direction of a conductor, and it was a part of the regular duty of this section man to do this particular work whenever requested or required, as much as it is the duty of a brakeman to couple cars.

The general charge was erroneous and tended to mislead the jury to the manifest prejudice and injury of the defendant.

It is respectfully submitted that the judgment of the Circuit Court should be reversed.

JOHN W. CARY,
Of Counsel for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~305~~ 91

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES ARTERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BURTON HANSEN,
W. J. KNIGHT,
Attorneys for Plaintiff in Error.

J. W. CARY of Counsel,

FOUKE & LYON,
Attorneys for Defendant in Error.

H. B. FOUKE of Counsel.

POINTS AND BRIEF OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~395~~ 91

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vs.

JAMES ARTERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BURTON HANSEN,
W. J. KNIGHT,
Attorneys for Plaintiff in Error.
J. W. CARY of Counsel,

FOUKE & LYON,
Attorneys for Defendant in Error.
H. B. FOUKE of Counsel.

Because of the great importance of this case to the suffering appellee we ask of this Honorable Court in his behalf leave to present a statement of the case, and a printed brief showing our view of the law.

We have not yet been served by plaintiff in error, with its statement or printed brief, but in order that the case may be submitted when reached, even if we are not present, we file in behalf of appellee a statement and a printed brief now.

STATEMENT OF THE CASE.

The undisputed facts of this case are as follows: Mr. Artery was injured for life and at the time of the trial was a helpless, hopeless, uncurable cripple, dead from the loin portion of the spinal column to all parts below, with his muscles all wasted away, leaving nothing but skin and bone, and to-day, a period of six years and nine months from the time of his injury, his condition is more serious, if possible. All these years he has been an object of charity.

The plaintiff in error is a corporation organized under and by virtue of the laws of Wisconsin and doing business in Wisconsin, Iowa and other states.

The plaintiff in error owns and operates a line of its road from Dubuque, Iowa, to St. Paul, Minnesota, the line running through Allamakee County, Iowa, the home of the plaintiff before he received the injury complained of. For "seven summers off and on" the appellee had worked for said railroad company as a section man under a section foreman. The work in which appellee was engaged under the foreman was in working upon the road, road bed, track, culverts, ditches, and in doing all such work as would keep the road in good condition for use and safe operation for the company and its patrons.

The plaintiff at the time he was injured was about twenty-seven years old, was in good health and "could do anything," as he said. About the 1st of March, 1883, (after being laid off in November, 1882,) he again went to work for the railroad company, working on a section that commenced at Harper's Ferry, a hundred miles north of Dubuque. The section was about six miles long and ran in a northerly direction. He worked under a foreman named P. Rellehan, and there were five men in the crew besides the foreman. On the 5th of March, 1883, this foreman with his crew, including appellee, started north from Harper's Ferry at about 7 o'clock in the morning on a hand car, returning for dinner. In the afternoon the foreman and crew started out again, going up the section about five miles. It was a cloudy afternoon, and it commenced snowing between 2 and 3 o'clock and snowed all the afternoon.

Some time after 5 o'clock the foreman, Rellehan, gave orders to place the hand car on the track. "He told us to put the car on first and put the tools on the car and start for home." (Record

p. 27.) The tools were all put on and the foreman and all the crew got on to the platform of the car to work the levers (pump the cars in railroad parlance).

The snow that had fallen covered the top of the rails, and when the crew undertook to start the car would not go ahead, but the wheels would spin around and slip on the rail, and the hand car would not move. The car was pushed by hand for a short distance, but was making no progress.

Thereupon Rellehan, the foremrn, said "that this would never do; some of the men take shovels and run the snow off the rails." (Evidence of plaintiff in error, Record 35.) Thereupon the appellee was placed on the front end and east side of the hand car, and one Kennedy on the other side, with shovels in their hands to hold on the rails, and thereby force the snow off the rails in order that the hand car could make speed.

The car started with appellee placed with a shovel as stated, four men had hold of the breaks of the car, two front and two rear, the foreman in front and in command. There was no appliance to hold up the feet of the men that had the shovels.

There were no brooms or other appliance to brush the snow off the track.

In this condition of things the car started for Harper's Ferry *on the time of a freight train*, of which the plaintiff below was not informed, with the men working hard on the breaks going at a good speed towards Harper's Ferry, and when within 2½ miles from there a bridge was passed, and then beyond this there was a culvert, and cattle guard and crossing, and in passing over this culvert the appellee, Artery, was in some way caught, drawn under the hand car, doubled up under it, with the car on him, and so firmly wedged in that the car had to be broken to get him loose, all of which, as the jury found, caused his hopeless condition as stated *supra*.

THE ACTION

was brought in the District Court of Dubuque County, Iowa, and by the plaintiff removed to the Federal Court. The petition and amendment thereto alleges his employment by the company, the kind of work he performed, that he was working under a foreman, and that on the 5th of March, 1883, and that towards evening the

foreman ordered the crew to start to return to Harper's Ferry on a small hand car, *that said car was ordered to start at the time and on the time a train of cars was due*, of which plaintiff below had no knowledge. That on said 5th of March the snow had fallen and covered the iron rails and that the foreman ordered plaintiff below to seat himself *on the front of the car, and hold a shovel on top of the rail*, in order to move the snow. That no place had been provided on the car for the feet to rest upon while performing such kind of duty, and that in holding said shovel plaintiff below was compelled to exert all his strength, *and by muscular exertion hold up his feet and at the said time guide and hold said shovel.* That said hand car was run at a dangerous rate, and without the proper appliances to push the snow off said rails; and that the cattle guard was improperly constructed, and that some of the three-cornered pieces of the cattle guard stood above, or higher than the surface of the iron rail; and that by reason of the negligence of the defendant below, and without fault or want of care on the part of plaintiff below, he was injured for life.

THE ANSWER

of defendant below was

1. A general denial.

2. The injury was caused by plaintiff's own want of care.

3. That plaintiff entered the employ as a section man, and was aware of all its duties, etc., and that when he started to ride on the car he knew all about the track, culverts, etc.

The cause was tried to a jury, who after hearing all the evidence, charge of court and argument of counsel returned a verdict on the 8th of April, 1887, for the plaintiff below for $13,500, and which was sustained by the trial court after argument on motion for a new trial.

EVIDENCE.

There was but little conflict in the evidence; none as to how and where the injury happened; none as to the fact that Mr. Artery is a hopeless, half-dead, incurable cripple; none as to the fact that the hand car had no rests for the feet of those who held the shovels, nor brooms attached to move the snow off the rails, and that by muscular exertion alone Mr. Artery was compelled to hold up his feet; none as to the fact that *Artery had never been ordered*

to hold a shovel on the rail before; and had never seen one held so before; and that he knew nothing about the hazards or dangers connected with the holding a shovel in that way. (Record, p. 14.) There is no conflict but what Rellehan, the boss, knew that Artery was on the corner of the car with a shovel and on cross examination (Record, p. 37,) says: "I would not say but I made some remark * * * * in regard to telling Kennedy and Artery to take shovels."

The evidence is well nigh conclusive that he did order Artery to take the shovel, and the place on the hand car. Mr. Artery testifies (page 12 Record): "We started her up and the wheels would spin all around. They wouldn't go ahead at all; the wheels would slip on the rail. We was there maybe a minute trying to start, maybe more. Then Mr. Rellehan turned around and he says: 'Boys this will never do.' He says to me, pointing to me: 'You get that shovel and go there and hold it onto the rail and knock that snow off.'" In this he is corroborated by Jerry Artery, page 8 Record; O'Neill, pages 27–28, and in substance by Donolan, a witness for the company, page 35, and by Rellehan, quoted *supra*, and by Kennedy, 33.

Rellehan, the boss, says (Record 37): "The plaintiff was a good man to do his work. He suited me all right. The men were under my orders * * * if they did not obey *I would dismiss them from the Company's service.*

There is no conflict as to the hand car being started for Harper's Ferry on the time of a train. O'Neill says, page 27 of Record: "*Rellehan had a watch and time card.* * * * *Before Rellehan ordered the car put on the track he said we were on the train's time; to get her along if we could. He said the train must have been pretty close to us.*

This evidence is not denied.

The evidence proved that a train passed the crew just after Artery was taken from under the hand car. The witness Jerry Artery (page 19) says: "We were coming along pretty fast on the car just before we came to that crossing and I says to Rellehan: '*We are going too fast; some of the men will get hurted.*' And Rellehan says * * * '*Give her the gun, boys, give her the gun,*' and we were going I should judge between seven and eight miles an hour good." And on page 21 he says: "The handles ain't very far from the end of the car. * * * * You have to keep your back stooped a little way or the handle

will hit you in the back. The old cars were a little longer, you could sit up straight on one and they wouldn't bother you at all; you couldn't do it at all on this car."

The evidence shows that brooms could have been easily enough attached to the hand car, (Record pages 17-21,) and brooms were used on this same section (page 21, 34), and some of the company's witnesses say that they had seen brooms used.

The evidence shows that the speed of the hand car throwed the snow against the corner of the car and up the shovel handle and onto the hands of Artery. (Page 13.) Artery all the while was holding the shovel on the rail sitting where he was ordered, holding up his feet by muscular exertion.

The evidence shows that Mr. Artery was thrown from the car, just as it had got to the culvert; whether his heels came in contact with the ribbons or three-cornered pieces nailed on to the ties; or whether the shovel blade came in contact with either end of these pieces; or whether the blade caught in a joint of the rail was not made certain by the evidence, but it was one or the other. (Record 15, 30.)

The court at the request and instance of the defendant below directed the jury to proceed with the marshal to view a car which defendant below said was just like the car on which Mr. Artery was injured, and the Record, page 43, discloses that the jury fully examined the same.

The foreman of the crew testified (Record, p. 33,) that all the men in the gang were under his orders, and says "if they did not obey my orders I would dismiss them from the Company's service."

To the foregoing summary of the evidence, the defendant below offered no testimony that raised a conflict.

Defensive evidence was introduced by the Railway Company on the trial, which we think can with more satisfaction to this Honorable Court be pointed out in the following legal propositions.

We ask the indulgence of the Court before proceeding to examine the errors assigned to point out specifically some of the evidence on which the jury found the verdict.

The hand car had no appliances of any kind to support the feet of the men who were called upon by the *boss* to do the work of a snow plow. There were no brooms applied to move the snow

from the tracks. The evidence proves both of these could have been applied at a trifling expense.

The evidence is conclusive that the boss had a time card and watch, and "we were on the train's time, to get her along if we could."

The boss ordered the plaintiff into the dangerous work, and says he had the power to discharge him if he did not obey his order.

The plaintiff had never before seen a shovel so held and knew nothing about the hazard or danger connected therewith.

The hand car was run at a dangerous rate and the boss was told that "we are going too fast—some of the men will get hurt," to which the boss says, "Give her the gun, boys, give her the gun."

The ribbons were either too high over the cattle guard or too near the ties. Either the shovel caught the end of the ribbons, or the feet of plaintiff came in contact with the top of the ribbon.

The evidence shows that the plaintiff would have to bend forward in his position holding the shovel or the pump handle of the car would hit him. (Record, 21.)

Demonstrative evidence was placed before the jury at the instance of the Company by producing a like hand car, the jury fully examining the same. (Record, 43.)

The distance the plaintiff held up his feet in the position he was placed to the place of injury was about 3½ miles, or over half an hour.

The defendant Company introduced evidence raising a conflict as to the car, culvert, speed, etc.

The jury under the charge of the Court found the issues for the plaintiff below, and which finding this Court will not retry or examine.

Woodruff vs. Hough, 91 U. S., 603, opinion.

ARGUMENT.

I.

Plaintiff in error does not question the constitutional soundness of section 1307, Code of Iowa, in which it is provided that railway corporations shall be liable for all damages received by an

employee, in consequence of the mismanagement of agents, or other employees, when such damages are received while in any manner connected with the use, and operation of any railway, on or about which they shall be employed.

This Court in *Missouri Pacific Railway Co. vs. Mackey*, 127 U. S., 205, uphold a like law found in the Statute of Kansas; and in *Minneapolis and St. Louis Ry. Co. vs. Beckwith*, 129 U. S., 26, like laws, in the Code of Iowa, are held to be valid.

The Supreme Court of Iowa has uniformly held, that a person working as a section hand, whose duty it is, with others, to keep a certain distance of the railroad in repair, and to go on the hand car for that purpose, comes within the meaning of section 1307, Code of Iowa, *supra*.

Frandsen vs. Railway Co. 36 Iowa, 372.

Houser vs. Railway Co., 60 id., 230.

II.

It is our judgment, that we will best aid this Court by discussing the errors assigned, as nearly as possible, in the order they are alleged to have occurred.

The 19th error assigned relates to the action of the Court at the close of all the evidence in refusing to direct the jury to return a verdict for the defendant.

The request was an absurd one. The evidence of negligence on the part of the defendant below was conclusively proved. The defendant undertook to raise a conflict, upon which it was the province of the jury, under proper instructions, to decide upon the weight of testimony; and this is a rule which has always been abidingly observed in this Court.

In *Spring Co. vs. Edgar*, 99 U. S., 656 of opinion, it is said: "Circuit Courts cannot grant a nonsuit, but the defendant at the close of the case may move the Court * * * * * * to direct a verdict for the defendant. In considering the motion the Court proceeds upon the ground that all the facts stated by plaintiff's witnesses are true, and the rule is that the motion will be denied unless the Court is of the opinion that in view of the whole evidence, and of every inference the law allows to be drawn from it, the plaintiff has not made out a case which would warrant the jury to find a verdict in his favor." This rule of law is

alike applicable when the motion is made at the close of all the evidence.

In *Greenleaf vs. Birth*, 9 Pet., 292, 299, it is said by the Court: "It is the province of the jury to weigh and decide on the sufficiency of the evidence. * * * * Where there is no evidence tending to prove a particular fact, the Court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have."

This Court has over and again announced the same rule in *Phœnix Ins. Co. vs. Daster*. 106 U. S., 30, 32, and the cases therein cited.

Spring Co. vs. Edgar, 99 U. S., 656, in point.

Ry Co v McDade 135 id 567

Hough vs. Railway Co, 100 U. S., 213, 225, in which it is said: "We may add it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed."

In *Kane vs. Railway Co.*, 128 U. S., 91, this Court reverse the Court below for directing a verdict for defendant.

Dunlap v Ry Co 130 id 649

In the case at bar the conflict of evidence is much greater than in *Kane vs. Railway* cited *supra*.

Railroad Co. vs. Stout, 17 Wall, 657, 663, has come to be a leading case on this question in the American Courts. *Klein vs. Russell*, 19 id., 433.

The rule is elementary. 2 Redfield on Railways, 231. 2 Wood Railway Law, pages 1257-58. Cases from all the States can be cited, but it would seem to be a work of supererogation.

III.

The 20th assignment alleges error, in the Court in refusing to give the several instructions numbered from 1 to 15, inclusive.

This assignment should not be considered because it is too general and not specific enough. The assignment compels the

Court to search the record through and through in order to hunt up any supposed error that will fit any one of the fifteen requested instructions.

Because the rule of practice has been disregarded the assignment should be ignored and the case dismissed.

Union Ins. Co. vs. Smith, 124 U. S., 406, 424.

Benites vs. Hampton, 123 U. S., 519.

Rule 21, par. 2, *Lucas vs. Brooks*, 18 Wall, 436.

Portland Co. vs. United States, 15 id., 1.

Deitsch vs, Wiggins, id., 536.

The State Courts will ignore an assignment of errors like the one in question. From Iowa we cite *Albrasky vs. Iowa City*, 76 Iowa, 301, and cases cited.

IV.

Should the 20th assignment be held specific enough, then we say that the instructions asked by the defendant below would have taken away from the jury the consideration of the evidence in the case. While, however, they do not ask that the jury return a verdict for the defendant below, yet the jury would have legally been advised to do so by the Court, if the instructions had been given. The plaintiff's case was controverted below by the defendant with all the evidence it could produce, and the testimony was such that each party was entitled to the verdict of the jury, on the facts and issues. What we have shown in our second point *supra* and the authorities there cited justified the learned judge who heard the case in refusing to give the instructions asked; because the Court in a charge presented fully and fairly the whole controversy.

In *Mills vs. Smith*, 8 Wall, 27, it is said: "Courts of the United States are not bound to give instructions upon specific requests by counsel for them. If the Court charge the jury rightly upon the case generally, it has done all that it ought to do."

The following cases are precisely in point:

Ind. R. R. Co. vs. Horst, 93 U. S., 291.

Railway Co. vs. McCarthy, 96 id., 258.

Ry Co v McDade 135 id 567
Penlap v Ry Co 130 id 649

Klein vs. Russell, 19 Wall, 433.

Railway Co vs. Whitton, 13 id., 270.

Lober vs Cooper, 7 Wall, 565.

The Schools vs Risley, 10 id., 91.

Kelly vs. Jackson, 6 Pet., 622.

The charge was far more favorable in our judgment to the defendant below than the evidence warranted.

V.

The 21st assignment of error has no merit, as will be seen by reading that portion of the learned Court's charge, found on page 61 of the Record, to which exception is taken.

In this portion of the charge, the Court was making use of the exact illustration that counsel for the Company made before the jury.

In the trial we introduced elementary authority and adjudged cases holding it to be the duty of an employee to obey his superior. In Wharton's Law of Negligence, section 222, it is said, *quoting*, "The servant on entering upon the the employment is supposed to know and assume the risk. But does he risk the carelessness and negligence of those placed over him, in the selection of suitable machinery, and the appliances incidental to the employment? He acts in subordination. His simple duty is obedience. He has no means or opportunity of knowing whether the articles furnished are safe, and has to rely on the judgment of his superiors. * * * * If the master deputes the superintending control of the work, with the power to employ and discharge hands and purchase and remove materials to an agent, then the master acts through the agent and the agent becomes the master. * * * * His acts are the acts of a master and superior, and the servants are bound to use whatever materials, machinery, apparatus or appliances he may see fit to provide for them."

The authorities we cite in our 4th point *supra* fully disposes of the 21st assignment of error. The charge was as fair and as impartial as well could be made; and what is said in *Evanston vs.*

Gunn, 99 U. S., 660, 667, seems here appropriate: "Sentences may, it is true, be extracted from the charge, which if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled."

VI.

In the light of the entire charge of the learned judge who tried the cause, when the principles of law, as ruled over and again by this Court, as we have shown in our 4th and 5th points, *supra*, are applied to the charge, it would seem as though it were trifling with the course of the law to make the 22nd assignment. It is an absurd pretense, and well nigh culpable, to ask the Court to hunt all through the proceedings, evidence and charge, to find some error on which the 22nd assignment can be predicated.

The 22nd assignment should not be considered. It violates Rule 21, par. 2, and the practice and procedure of this Court. See point III *supra*.

Besides the 22nd assignment, as a matter of fact, is entirely without any ground on which it can be sustained. The charge covered the entire case, and the jury could not be misled as to what constituted negligence.

Railway Co. vs. Whitton, 13 Wall, 290 of the opinion.

VII.

The 1st, 2d, 3d and 4th assignment of error seem next in order, and can all be considered at once.

By looking at the answer of defendant Company—Record, page 9—it will be seen that the defendant tendered the issue to which the questions objected to were directed.

Under the laws of Iowa the plaintiff below had the burden of proof, and in order to recover must prove that he himself was not guilty of negligence but that the defendant Company was.

The evidence in question will be found in Record, pages 14, 17.

The plaintiff below in order to negative the charge of contributory negligence had the right to show, and we think it was our legal duty to show, that the plaintiff below had never been

ordered to hold a shovel on a rail before ; that he had never seen one so held before ; and that he knew nothing about the hazard or danger connected with such a holding. The evidence was competent relative and material.

It was the character of evidence that tended to prove the plaintiff's case.

By the practice of the Courts of Iowa the plaintiff below had the burden of proof as to negligence, and the Federal Courts of Iowa in cases like this follow the same rule. In *Gamble vs. Mullin*, 74 Iowa, 99, the last case it is said : "It was incumbent upon plaintiff to prove himself free from negligence notwithstanding the fact that negligence on his part was stated in the answer."

In *Gandy vs. Railroad Co.*, 30 Iowa, 420, it is stated that "The plaintiff must aver negligence, and, of course, the burden of proving it is upon him ; and as the mere fact of injury does not in any other case prove negligence or other wrong upon the defendant so it does not in this."

In *Baird vs. Morford*, 29 Iowa, 536 of the opinion, it is said : "A party claiming to recover for the negligent or unskillful acts of another must show him to be wrong, and also prove, *if an issue thereon is made*, that no negligence of his own caused the injury."

In *Carlin vs. Railroad Co*, 37 Iowa, 316, it is again held "To entitle plaintiff to recover in an action for personal injuries alleged to have been caused by defendant's negligence, he must not only show negligence on the part of the defendant causing the injury, but also that he himself has not been negligent, and the burden of proof is upon him to show both of these facts."

Holding the same rule see *Nelson vs. R. R. Co.*, 38 Iowa, 564 ; *Way vs. R. R. Co.*, 40 id., 341 ; *Benton vs. R. R. Co.*, 42 id., 192 ; *Lang vs. R. R. Co.*, 49 id., 469 ; *Bonce vs. Ry. Co.*, 53 id., 278.

In *Hawes vs. R. R. Co.*, 64 id., 315, the Court holds : "In an action for personal injuries, the burden of proving want of contributory negligence is upon the plaintiff and this is true, even though defendant pleads the existence of contributory negligence as an affirmative defense : therefore held that it was error to instruct the jury in such a case that, as to the material allegations of defendant's answer the burden of proof devolved upon defendant."

This general rule as to proof in personal injury cases has been held in this State since 1855 by the State Courts and well nigh uniformly by the Federal Courts.

The Iowa rule as to the burden of proof, and what the plaintiff must prove, is followed, we think, by a majority of the State Courts of the Union.

We are aware of the fact that this Court does not hold to the same rule, as broadly as some of the State Courts.

However, if the ruling of this Court would not hold the plaintiff to make such strict proof, how, may we ask, can the plaintiff in error claim that there was error, in admitting the evidence, especially in view of the long line of Iowa cases holding such evidence a prerequisite to a judgment?

Therefore the learned judge did not err in allowing plaintiff below to prove, in order to make out his case, that *he did not omit* to take any precautions to avoid injury and that he had never held a shovel on a rail before; and that he knew nothing about the hazards or danger of holding it on the rail.

It was simply proving that he knew nothing about the dangers or hazards of such kind of work *or in the exercise of ordinary care should have known* at and before the time he obeyed the *imperative, positive order of the boss*. And under all the evidence, we respectfully submit that by no possible reasoning could the Court or judge charge this unfortunate man with a knowledge, or means of knowledge, of the danger into which this grossly careless *boss* placed him.

VIII.

The 5th, 15th and 16th errors relate to the rejection of a piece of evidence offered by the defendant below.

In the progress of the trial, the defendant on the cross examination of Jerry Artery, a brother of the plaintiff, and a witness in his behalf, showed him a paper which the witness said he signed, whereupon defendant asked the following question:

"In the written statement which I have just shown you, you state as follows: 'At the time Jim got hurt we were running from 4½ to 5 miles an hour—certainly not to exceed 5 miles.' Is that statement correct?"

The Court in sustaining an objection gave the following reasons: (Record, page 22.)

Objected to by plaintiff; objection sustained.

The grounds upon which the Court sustained the objections to interrogatories to this and other witnesses, based upon a written statement signed by the witness and to the introduction of the written statements themselves were—

That it appears that the statements were not volunteered by the witnesses, but that the Company had sent its claim agent, after the happening of the accident, to examine the employees of the Company who were present at the time of the accident in regard to the transaction: that the statements made by the witnesses were not taken down in full, but only a synopsis thereof made by the agent, the correctness of which is questioned by the witnesses in some particulars, although such writen statement was signed by the witness.

That upon the trial of this case these statements thus obtained were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited; that it is apparent to the Court that whether so intended or not these statements become a ready means of confusing and intimidating witnesses before the jury, and that if it be permitted to parties to thus procure written statements in advance from witnesses and then use the same in examining such witnesses it will enable parties to shape and control the evidence in a cause by committing the witnesses to particular statements, couched in the language not of the witness, but of the party carrying on such *ex parte* examination.

That these growing abuses can only be prevented by entirely excluding such statements thus procured from being introduced in evidence for any purpose.

That if the party desired to impeach a witness by showing contradictory statements made by him the person to whom or in whose presence such alleged contradictory statements were made should be called as a witness so that opportunity might be afforded of placing before the jury the statements actually made by the witness sought to be impeached and not a mere synopsis thereof made by another person, and the accuracy of which, in some particulars, was challenged.

Exception by defendant.

That the Court was justified in its statement, that the correctness of the paper was questioned, see the evidence of Jerry Artery (Record, page 26.) and of O'Neill (pages 31 and 35).

It is well known to all Courts and lawyers in the West that the defendant Company has in its employ a force of detectives, or claim agents, that equal anything from the Pinkerton or Scotland Yard agencies. These men prepare these *masked batteries*, *these statements that are not put down as given.* These statements are obtained from an employee, no matter by what means.

In litigations of this character the moment an injury happens one or more of these detectives are on the ground. When the trial comes on, the employee if called as a witness for the plaintiff, then it is that these statements, obtained for the very purpose of heading off an impartial trial, are produced as contradictory or impeaching evidence in the place and stead of the *detective* who wrote out what purports to be a statement given by the witness.

It would seem to be a solemn mockery of justice to allow such a rule of evidence to obtain.

This Court has condemned in plain language this kind of practice. In *Vicksburg vs. Railroad Co.*, 119 U. S., 99, 103, it is said, quoting: "The practice of admitting in evidence the unsworn statements of witnesses, prepared in advance of trial, at the request of one party, and without the knowledge of the other party, should not be encouraged by further departures from the established rules of evidence." We submit, that the practice of thus preparing statements, of thus holding over the head of an employee the fear of dismissal; and thereby procuring a signature to a paper the signer cannot read, and which statements as thus written down are not those given, is an abuse that should speedily be exterminated. We all know they are base schemes, violating elementary rules of law, and Judge Shiras, we believe, will be cordially sustained by this Court in his ruling the paper out.

From the very nature of the question asked, it was proposed, not only to impeach the witness, but to make the statement affirmative evidence. Clearly this would be improper—because it would be permitting the defendant below to use the statement in fact as a deposition. "Is the statement correct?" was the question asked.

If the facts can be proved in this way and the testimony introduced then the agents of the railway company can practically take the evidence, write down a part of what may be said, garbling and changing other parts, and omitting many things said; and then as written put it before the jury as original evidence.

Evidence is never produced in this way. As is said by this Court in *Ins. Co. vs. Trebz*, 104 U. S., 203, "The nature of this written instrument as affected by its form must be considered in every question of its interpretation. It is not a formal instrument * * * like a deed, or framed with precision to express a certain and definite covenant which the parties duly advised have entered into with deliberation and solemn form. It is, on the contrary, a conversation reduced to writing and the writing done by one only of the parties. * * * * It is in the shape of a deposition where the party interrogated is giving his testimony, and where the meaning of his statement must be ascertained from his own pecular use of language. * * * * The circumstances should be considered in determining the meaning of the words he has used."

Transactions on the part of these agents of the Company which the Court condemned was an active fraud, not only against the witness but against the administration of justice. Such conduct if it be permitted by the Courts will lead to abuses and seriously affect the public and private interests of all suitors in the Courts.

The conduct of these detectives was such that they were not called by this giant defendant corporation to confront the Court and the witness they had imposed upon.

They knew well enough that their very conduct was mercenary, was contrary to public law, morals and decency; and they intended to control by their conduct in trying to intimidate and confuse the witnesses a correct finding upon the facts in the case. But the learned judge below with a true policy took a legal and an efficient way of conserving, not only the true dignity of a Federal Court but of the State likewise; and it is due to common justice that he shall be upheld.

Again, these statements cannot be received as impeaching or contradicting the witnesses upon the well known ground that it

was proved and not attempted to be denied that the statements were not in fact what the witnesses said. Contradictory statements by a witness, whether oral or in printing, cannot be given in evidence to impeach him unless he has been asked whether he made such statements to the persons to whom it is attempted to be shown he did make them. It is the elementary rule and also the rule over and again laid down by this Court. These fixed-up statements were met by counsel for plaintiff at once and the Court easily found out just how they were obtained. Evidence was offered showing that they did not contain what the witnesses did say, and that the *statements* were only an imperfect synopsis of what was said, and no pretense on the part of the railroad company that the statements were a full and true statement as given.

As was said by this Court in *Lucas vs. Brooks*, 18 Wall, 454, "A judge well performs his duty when he guards the jury against having their attention diverted from the real issue by the introduction of immaterial evidence" and *a fortiori* when he guards the jury, and the administration of justice, against an attempt to avoid a full and fair presentation, of a helpless, hopeless, incurable cripple's case on the merits, by those seeking to prevent the full truth from being heard.

Again, when a party proposes to impeach a witness by proving inconsistent written statements he must read to him the paper and if its *genuineness* is admitted the party may then as a general rule introduce the paper.

In this case all that was done below with the paper by defendant was to show it to the witness, and ask him if that was his signature. Then a sentence was read and the witness was asked: "Is that statement correct?"

We submit that the law sanctions no such plan of impeachment. The entire paper should have been read over to the witness so that he could have been informed of its contents, and if it did not contain what was in fact said by the witness, then as a matter of law, it could not have been introduced, because it did not contain what the witness in fact did say.

In 2 *Greenleaf, Ev.*, § 463, it is said if the witness "admits the letter to be his writing, he cannot be asked whether statements, such as the counsel may suggest, are contained in it; but the whole letter must be read as the only competent evidence of that fact."

It was then not competent to repeat particular sentences and ask "Is that statement correct?"

In a case where a sworn statement in writing is produced it is not competent to select out particular sentences and passages and ask the witness if he so testified; because of the rule that the sworn statement was the best evidence.

In *Queen's* case in the House of Lords, 2 *Brod and Bing*, 288, 3 *Stark Ev.*, 1742, it was held that a witness could not upon cross-examination be asked whether, in a certain letter (admitted to have been written by the witness, and in the hands of the party putting the question,) he did not make certain statements, or use certain expressions, but that the letter itself *must first be read* before the cross-examination can be pursued; and such we think is the well established rule and practice in the State and Federal Courts.

In *Wharton's Ev.*, § 553, "When the question is as to former expression of opinion in writing, it is usually enough if the writing is shown or read to the witness in advance; and then, if the *genuineness* of the writing is admitted, or proved, it can be put in evidence." And see § 68, id., for the answer given to the House of Lords by the judges of the Queen's Bench, holding that the entire paper must be read and its *genuineness* first established.

Ayers v Walton 132 Ill 394

IX.

There is nothing in the printed record on which the 16th, 17th and 18th errors can be predicated. Counsel for the railroad company did not offer to read the exhibits, and nowhere in the printed record does any such offer appear. All the counsel for defendant offered was to read a sentence, and ask "Is that statement correct?" We have shown *supra*, paragraph VIII., that not only was the paper correctly ruled out—even if it had been proposed to read it to the jury—but also the ruling was correct, in not permitting sentences to be read in the manner proposed by the defendant Company's counsel.

X.

The 6th, 7th, 8th, 9th, 10th and 11th errors are predicated on the ruling of the Court in sustaining objections to evidence offered on the trial by the defendant Company. See Record, pages 24, 25, 26.

The question upon which the 6th error is predicated is as follows:

Q. On the occasion I have referred to, did you make this statement: "Six men on a hand car have plenty of room. We often have had eight or ten men on a hand car of the same size"? (Record, page 24.)

The other five questions which were ruled out were of about the same import as the one herein set out.

The ruling of the trial Court should be upheld because--

1. The series of questions were not proper on cross-examination; as no such questions having been asked on the direct.

2. What the witness may have said, by way of an opinion, or hypothesis, at other times, and places, was not competent as against the plaintiff.

3. The questions were incompetent, irrelevant and immaterial even if the witness did tell the Company's detectives that "he was a larger man than Jim and his legs a great deal longer," and that "six men on a hand car have plenty of room," and that "there is no way for a man to get hurt unless he forgets himself and lets his feet drop," and that the "hand car was in good condition—nothing broken about it in any way," and "I remember distinctly of the foreman cautioning the men to keep their feet up and be careful," and "I was watching Kennedy because I was afraid he would get hurt as I didn't think he had ever held a shovel before."

That these random conversations outside of the main issue made by the witness in the *presence* of Mr. Buel (not *to him*, only in his presence,) are incompetent, irrelevant and immaterial, is too plain, we think, for serious controversy.

There can be no pretense that the plaintiff below was present at the time; and any declaration by the witness cannot bind, or establish any obligatory relation, with the plaintiff. Suppose the statements and opinions were uttered in ignorance, or levity, or mistake, or by a *semi coercion*, through over zealous persuasion. The very facts disclosed before the Court below on the *voir dire* as to these statements, shows that the acts of the agents of the railroad company, in whose *presence* the question placed the wit-

ness, opens a vast field for misapprehension, perjury or subornation of perjury, and fraud, which would be prejudicial to any honest suitor in a Court of justice, were they admitted. If any such rule should obtain, then one or two conspirators could deprive a man of his estate, and practically drive him out of the Courts by getting into the jury box opinions and garbled statements.

4. The testimony was hearsay in the broadest sense of the term. It was a random conversation not in the presence of the injured plaintiff.

As affecting the plaintiff's right to recover for the injury done him by the negligence of the defendant railroad company's employees on either of the grounds *supra*, the evidence was not competent, relevant or material.

If the evidence was intended to affect the credibility of the witness it was incompetent for that purpose, on the well known ground that incompetent and immaterial questions are not permissible on cross-examination in order to predicate an impeachment or contradiction of the witness. *Storm vs. United States*, 94 U. S., 76. *The proposed questions could have no effect* upon the final result of the case, except as they might tend to impair the credibility of the witness, and for that purpose they were incompetent.

Again, the questions only related to an opinion the witness gave in a conversation at Harper's Ferry, in the presence of Mr. Buel. An opinion expressed by a witness as to the facts of a case is inadmissible, though in conflict with his testimony in chief.

In *Harris vs. Wilson*, 7 Wend, 57, it is held to be settled law that, "a witness cannot be examined as to a distinct collateral fact, for the purpose of impeaching his testimony, by contradicting him; but if a question relative to such fact be put and answered, evidence cannot afterwards be adduced for the purpose of contradiction." This is the rule found in *Starkie*, *Phil*, *Greenl* and *Wharton*.

In *Carpenter vs. Ward*, 30 N. Y., 243, the Court decide that "to entitle the examining counsel to show the discrepancy, for the purpose of impeaching the credibility of a witness, it must appear that the testimony related to a point material to the issue on trial." And holding the same rule we cite *The Trustees, &c., vs. The Brooklyn Ins. Co.*, 28 N. Y., 153. It would seem to be unneces-

sary to cite further cases on the point; the rule is held uniformly by the Courts of America.

This rule is expressly laid down in *Elton vs. Larkins* (5 *Carr & Payne*, 385,) and fully approved in a well considered opinion by the Supreme Court of New York reported in 18 *Barb*, 420, and approved in 55 N. Y. Court Appeals, 599; the *sylabus* of which we quote: "A witness cannot be contradicted by showing that he has, out of Court, given an opinion, relative to the subject matter of the suit, inconsistent with the conclusion which the facts sworn to by him on the trial will warrant; especially where it appears that such previous opinion was founded upon what the witness had heard. The rule which allows a party to impeach a witness by showing that he has made statements, out of Court, inconsistent with what he testifies in Court, does not extend to such a case. The statement of the witness, upon which he can be impeached within the rule, must not only relate to the issue, but it must be a matter of *fact*, and not merely a former opinion of the witness in relation to the matter in issue, inconsistent with a different opinion which the facts testified to by him tend to establish."

In 2 *Phil's Ev.* (*Cowen Hill and Ed.'s Notes*, 972,) it is of the text that "the opinion of a witness called by the defendant, as to the defendant's chance of success, or the merits of his defense, is not matter on which he can be afterwards contradicted, if he denies the statement imputed to him."

And finally, if all the evidence as contemplated in the 5th to 11th error inclusive had been presented to the jury, it would not have changed the result, in our judgment, when all the record is considered.

XI.

The 12th assignment of error has no merit. The question was proper, in view of what counsel for the Company had just asked the witness. In no view of the case was the Company prejudiced by the answer. The answer was "No sir;" and then followed without any objection the statement of the witness as to the character of the written statement and how they were obtained. The evidence was competent, it being the same evidence in substance that the Court had before it when the written paper

was ruled out. None of this evidence was objected to nor asked to be ruled out.

XII.

Our views on the 13th and 14th assignments of error are fully presented in the X. paragraph *supra*. The rejected evidence in these assignments is of precisely the same character as that offered in the 6th to 11th assignments inclusive.

Finally, Courts never examine a record to find a reason for reversal, but do in order to sustain a verdict. This case on the merits and facts, we apprehend, is singularly a strong one. Not only was the *boss*, Rellehan, grossly negligent, but his acts were akin to criminal carelessness. He turned the half-dead plaintiff below into a snow plow, and then while running on the time of a train, after being warned that the men with the shovels would get hurt, he responded, standing in command: "Give her the gun, boys, give her the gun," and soon thereafter this poor, half-dead plaintiff was whirled under the hand car, with the results stated in the opening of this brief. The law and facts demand that the judgment below should be upheld.

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